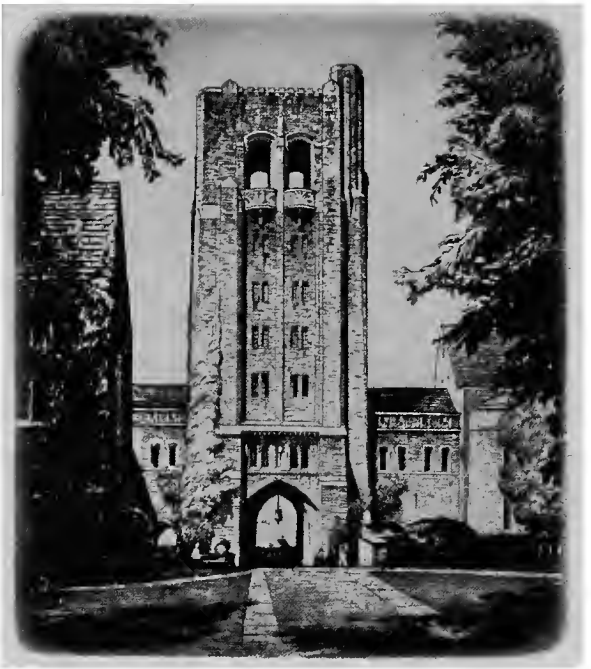

CIVIL CHURCH LAW

CASES

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TO ILLUSTRATE THE CIVIL STATUS OF
AMERICAN CHURCHES

BY

GEORGE JAMES BAYLES, Ph.D.

PRIZE LECTURER ON THE CIVIL ASPECTS
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PREFACE.

The object in the selection of the decisions contained in this volume has been to illustrate the policy of the American people in relation to organizations for the purposes of religion; and also to illustrate the elemental forms of ecclesiastical polity found among the churches. Those decisions have been selected in which the courts have laid down the broadest principles for the guidance of the body politic, and those that have the widest application to the bodies ecclesiastical. While the points in law that have received by these decisions final adjudication may be few, the data contained in these opinions of the courts have the highest value in their true reflection of the civil mind.

In point of time, these decisions cover nearly the whole period of our national life. The principles they set forth have produced a civil status for the churches that has no parallel in Christendom.

In the providence of God these principles of our American civil church law may receive a wider application among the peoples who have come under our jurisdiction by reason of the expansion of the national domain. In such an extended application novel circumstances would

be encountered, and out of adjudication caused by them must needs come a development of this body of law.

The question very naturally arises whether students of our ecclesiastical institutes, scientific ecclesiologists, will appear, who, having studied existing ecclesiastical phenomena, will, now, with trained powers, aid in the defense and guidance of the developing uses of liberty of thought and action for the purposes of religion.

Columbia University.
March, 1900.

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First Parish in Brunswick *vs.* Dunning.—The Supreme Court of Massachusetts, May, 1811. Reported in 7 Mass. Reports, 445.....Page 9

A minister of a town or parish under the Massachusetts establishment, seized of lands in right of the town or parish, as parsonage lands, was for that purpose a corporation sole.

In case of a vacancy in the office of minister, the town or parish was entitled to the custody of the lands, and might enter and take the profits until there was a successor in the office.

Every town was considered to be a parish, until a separate parish was formed, when the inhabitants and the territory which were not included in the separated parish formed the first parish; and the minister of such first parish held all the estates and rights which he held as minister of the town before the separation.

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York, 1832. Reported in 3 Paige's Chancery Reports, 296.....Page 13

Where property was conveyed for the use of an unincorporated religious society, and such society was afterward incorporated under a general act authorizing the incorporation of religious societies, the legal title to such property vested in the corporation.

The members of a church have no greater rights as corporators than any other members of the congregation who steadily attend divine worship with them.

The legal tribunals of the State have no jurisdiction over a church, or its members; and the ecclesiastical judicatories are not authorized to interfere with the temporalities of a religious society or congregation.

A church judicatory can not remove a clergyman from his situation as minister of a society or congregation, without the consent of a majority of the members of the congregation, or their legally constituted trustees, if the society is incorporated.

Shannon *et al. vs.* Frost *et al.*—The Court of Appeals of Kentucky, October, 1842. Reported in 3 B. Monroe, 253.....Page 23

A civil court can not revise ecclesiastical decisions, but may decide the rights of property and the use thereof.

It can not decide upon the regularity of an excommunication, but the fact it may decide.

The excommunicated members of a church to which property has been conveyed have no such interest therein as will authorize them to maintain a suit in relation thereto.

Excommunicated church members have no longer any right to vote in an election of trustees.

Petty, *et al.*, Trustees of Parish of Bellport, *vs.* Tooker *et al.*—The Court of Appeals of New York,

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Under the earlier New York Act for the incorporation of religious societies, the corporation had no denominational character, and none could be engrafted upon it.

The legal character of the corporation is not affected by the existence or non-existence, or ecclesiastical connection, doctrines, rites, or modes of government of a church formed by the corporators. The existence of the latter as organized bodies was not recognized by the municipal law.

The title of trustees to office and to the control of the corporate property is not impaired by any aberration in doctrine or church government on their part, or on that of those by whom they are elected.

Bouldin *vs.* Alexander.—The Supreme Court of the United States, December, 1872. Reported in 15 Wallace U. S. Reports, 131..... Page 39

Although a withdrawal by one part of a church congregation from the original body of it and uniting with another church or denomination is a relinquishment of all rights in the church abandoned—the mere assemblage in a church (as *ex. gr.*, the Baptist) where the congregational form of government prevails, of a majority of a congregation forcibly and illegally excluded by a minority from a church edifice in which, as part of the congregation, they had been rightfully worshiping, in another place—the majority excluded maintaining still the old church organization, the same trustees, and the same deacons—is not such a relinquishment; and the majority thus excluded may assert, through the civil courts, their rights to the church property.

Although the civil courts will not, in the case of persons excommunicated by competent church authority, go behind that authority and inquire whether

the persons have been regularly or irregularly excommunicated, the civil courts may inquire whether the expulsion was the act of the church or of persons who were not the church, and who, consequently, had no right to pass a sentence of excommunication.

In a church having an autonomous polity, the majority of members, if they adhere to the organization and doctrines, represent the church.

The State *ex rel.* H. W. Soares *vs.* Hebrew Congregation "Dispersed of Judah."—The Supreme Court of Louisiana, March, 1879. Reported in 31 Louisiana Annual Reports, 205.....Page 47

A mandamus will not lie to compel a religious society to restore to its membership one who had been expelled by a decree of the legally constituted church judicatory, on account of an alleged violation of some one or more of the laws of the society.

The civil courts will not revise the ordinary acts of church discipline, or the administration of church government.

Peace *et al. vs.* First Christian Church of McGregor.—Court of Civil Appeals of Texas, December, 1898. Reported in 48 S. W. Reporter, 534.....Page 53

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In re First Church of Christ, Scientist, in Philadelphia.—Reported in 20 Pennsylvania County Court Reports, 241.....Page 62

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promulgation of a form of worship, but also a system of treatment of disease to be carried into effect by persons trained for the purpose in the doctrines of "Christian Science," who may receive compensation for those services, the purposes violate the law regulating the practice of medicine (Pa., Act of March 24, 1877), and the charter will therefore be refused.

Lawyer and others *vs.* Cipperly and others.—The Court of Chancery of New York, December, 1838. Reported in 7 Paige's Chancery Reports, 281. Page 66

The New York Act of 1784, for the incorporation of religious societies, recognized three distinct bodies as existing in the incorporation of a Christian church, viz., the church or spiritual body, consisting of its office-bearers, and other communicants; the congregation or electors, embracing all the stated hearers or attendants on divine worship; and the trustees who were to have control of the temporalities of the society for the benefit of the stated hearers and the communicants.

The church proper, as to its doctrines, government, and worship, is to be governed by its own peculiar rules, which neither the congregation nor trustees can interfere with. But whether the church can, with the assent of the congregation and the trustees, change its government, discipline, mode of worship, or standards of faith; *quaere?*

The minister of an incorporated religious society can not be called and settled by the church or communicants only; but the assent of the trustees must be obtained, to authorize him to preach in a building belonging to the corporation or to occupy the glebe and parsonage.

If the trustees of a religious corporation should, without reason, refuse to employ a minister, against the wishes of the great body, both of the church and

the congregation, it seems that it would be such a breach of trust as to authorize the Court of Chancery to interfere to remove the trustees, and to allow the congregation to elect others in their places. But the trustees would not be guilty of a breach of trust by withholding their assent to the call of a minister whose employment would probably destroy the peace and harmony of the church or of the congregation.

This case is to be compared with the case of Robertson *vs.* Bullions, page 97.

Sutter *et al. vs.* The Trustees of the First Reformed Dutch Church.—The Supreme Court of Pennsylvania, 1862. Reported in 42 Pennsylvania State Reports, 503.....Page 73

A majority of a church congregation may direct and control in church matters consistently with the particular and general laws of the organization or denomination to which it belongs, but not in violation of them.

Where a congregation of one denomination forms a union with another belonging to a different denomination, which had an established form of church government, that congregation is bound by the rules of the denomination which it has joined, and can not afterward secede therefrom by a vote of a majority of its members.

Trustees of East Norway Lake Norwegian Evangelical Lutheran Church and others *vs.* Johannes Z. Holvorsen and others.—The Supreme Court of Minnesota, February, 1890. Reported in 42 Minnesota Reports, 503.....Page 80

Civil courts never assume to determine the abstract truth or falsity of any religious doctrine. The most they can do is, when rights of property, dependent on adherence to, or teaching of, a particular religious doctrine, to examine what, as a fact, the doctrine is,

and whether, as a fact, the particular person adheres to or teaches it.

When a congregation, in its constitution, adopts certain books as the exponents of its faith and doctrine, and there subsequently arise honest differences of opinion as to the interpretation of the statements of doctrine in such books, and the constitution is silent as to such matter of interpretation, and provides no mode of determining the differences, the civil courts will not hold that adherence to either interpretation dissolves, *ipso facto*, a member's connection with the congregation, so that he ceases to be a member of the corporation it has formed to hold and control its property.

Garrett Wehmer *et al.*, Appellees, *vs.* Wilm Jannsen Fokenga *et al.*, Appellants.—The Supreme Court of Nebraska, January, 1899. Reported in 57 Nebraska Reports, 510.....Page 89

Whether the tenets of faith, the practice, and church polity of one synod of the German "Evangelical Lutheran Church in the United States" differ in essential particulars from the tenets of faith, the practice, and church polity of another synod of such faith, is purely a question of ecclesiastical law, and not one that the secular courts will assume jurisdiction to investigate and determine as an original question.

When the ecclesiastical tribunals of the church have determined such a question, their judgment will be recognized by the secular courts as final and conclusive when the latter are called upon by the contending factions of a congregation to determine their rights as members of such church.

A majority of a religious congregation, or the trustees thereof, will not, at the suit of a minority of such congregation, be enjoined from employing as pastor for the congregation a minister professing and teach-

ing the same organic creed professed by the congregation, on the ground that such minister teaches certain doctrines and practices a certain church polity not taught and practiced by the minority nor by the original founders of the congregation.

In such a case, the minority must appeal to the supervising tribunals of the church, and their judgment the secular courts will take as final in the premises, and, if necessary and proper, enforce.

Robertson and others *vs.* Bullions and others.—The Court of Appeals of New York, June, 1854. Reported in 11 New York Reports, 243.....Page 97

A religious corporation created under the General Act of the State of New York consists, not of the trustees alone, but of the members of the society. Religious societies incorporated under the act are not ecclesiastical corporations in the sense of the English law. They are to be regarded as civil corporations, governed by the ordinary rules of the common law.

The trustees are the managing officers of the corporation, invested as to the temporal affairs of the society with the powers specifically conferred by the statute, and with the ordinary discretionary powers of officers of civil corporations.

The trustees can not take a trust for the sole benefit of the members of the church as distinguished from other members of the society, or for the use of a portion of the corporators, to the exclusion of others.

The trustees can not receive a trust limited to the support of a particular faith or a particular class of doctrines.

McGinnis *et al. vs.* Watson *et al.*—The Supreme Court of Pennsylvania, May, 1862. Reported in 41 Pennsylvania State Reports, 9.....Page 122

Under the Constitution of Pennsylvania, every religious society has its laws within itself as to its own

internal order and the mode in which it fulfills its functions, provided it keep within the bounds of social order and morality. Independent churches have their law in their own separate institutions; associated churches, theirs, in their own rules and in those of the associated organism.

The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, and principles which were accepted among them, before the dispute began, are the standard for determining which party is right.

The act of a synod is binding upon the congregations composing it as members, so far as the act is in accordance with its own laws; in general organizations of united synods or churches, the law of the general organism is binding on all the individual congregations; and a majority of a single congregation, dissenting from the act of union, and seceding therefrom, lose all their rights to the church property.

Watson *vs.* Jones.—The Supreme Court of the United States, December, 1871. Reported in 13 Wallace U. S. Reports, 679.....Page 128

Controversies in the civil courts concerning property rights of religious societies are generally to be decided by reference to one or more of three propositions:

1. Was the property or fund which is in question devoted by the express terms of the gift, grant, or sale by which it was acquired, to the support of any special religious doctrine or belief, or was it acquired for the general use of the society for religious purposes, with no other limitation?

2. Is the society which owned it of the strictly congregational or independent form of church government, owing no submission to any organization outside the congregation?

3. Or is it one of a number of such societies united to form a more general body of churches, with ecclesiastical control in the general association over the members and societies of which it is composed?

In the first class of cases, the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust.

If the property was acquired in the ordinary way of purchase or gift, for the use of the religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property.

In case of the independent order of the congregation, this is to be determined by a majority of the society, or by such organization of the society as by its own rules constitute its government.

In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government.

In such cases where the right of property is dependent on the question of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it.

The principles which induced a different rule in the English courts, examined and rejected as inapplicable to the relations of church and state in this country, and an examination of the American cases found to sustain the principle above stated.

Gilmer *vs.* Stone.—The Supreme Court of the United States, March, 1887. Reported in 120 U. S. Reports, 586.....Page 148

The restriction upon the right of a congregation, formed for religious purposes, to receive "land not exceeding in quantity . . . ten acres," which is imposed by the Illinois law of April 18, 1872, applies to congregations incorporated for the object named in Section 35 of that act, viz., "the purpose of religious worship"; and does not affect foreign benevolent or missionary societies incorporated either with the objects named in the incorporation of the Board of Foreign Missions of the Presbyterian Church in the United States, or with the objects named in the incorporation of the Board of Home Missions of that church, although both organizations are important agencies in the general work of that church.

The Consistory of The Reformed Church of Prattsville *vs.* Nicholas Brandow, Executor, etc., and others.—The Supreme Court of New York, 1869. Reported in 52 Barbour's Reports, 228.....Page 156

Construing the powers of a consistory of a Reformed Dutch church to receive and administer a bequest for the benefit of the church.

Chester Powers *et al.*, Appellants, *vs.* Ernest Budy *et al.*, Appellees.—The Supreme Court of Nebraska, January, 1895. Reported in 45 Nebraska Reports, 208.....Page 163

Courts which have no ecclesiastical jurisdiction will neither review nor revise the proceedings or judgment of church tribunals, when therein are involved only questions of church discipline.

There exists no power in courts of equity to supply lacking remedies for the regulation of the affairs of a church organization within itself. As a voluntary association, it alone has the power, and, if necessary,

must itself provide means for the adjustment of all matters with respect to its internal polity which do not affect the rights of the citizen or the jurisdiction of the State.

William A. Smith and others *vs.* Leroy Swormstedt and others.—The Supreme Court of the United States, December, 1853. Reported in 16 Howard U. S. Reports, 288.....Page 168

Determining the power of the General Conference of the Methodist Episcopal Church of the United States to provide for a division of that church into two or more distinct organizations.

The People *ex rel.* James B. Peck, Respondent, *vs.* Francis M. Conley and others, Trustees of the First Society of the Methodist Episcopal Church of the Town of Cohocton, Appellants.—The Supreme Court of New York, October, 1886. Reported in 42 Hun's Reports, 98.....Page 177

Jurisdiction of the court to restrain the trustees of a religious corporation from diverting its property from the church or denomination to which the corporation is attached.

When the trustees will be compelled by mandamus to open the meeting-house to a minister regularly appointed by the bishop to that place.

Terrett and others *vs.* Taylor and others.—The Supreme Court of the United States, February, 1815. Reported in 9 Cranch U. S. Reports, 43. Page 182

The religious establishment of England was adopted by the Colony of Virginia, together with the common law upon that subject, as far as it was applicable to the circumstances of the colony.

The parishes of the Protestant Episcopal Church in the State of Virginia as the legal successors to the

parishes of the communion of the Church of England in the Colony of Virginia.

Samuel Chase *et al. vs.* Charles E. Cheney.—The Supreme Court of Illinois, 1871. Reported in 58 Illinois Reports, 509.....Page 187

Ecclesiastical trial of a clergyman in the Protestant Episcopal Church.

The civil courts will interfere with churches and religious associations when rights of property or civil rights are involved, but will not revise the decisions of such associations upon ecclesiastical matters, merely to ascertain their jurisdiction. The decisions of ecclesiastical courts are final as to what constitutes an offense against the discipline of the church.

A rector of a Protestant Episcopal church has not such a vested right in his office—such a property in the right to preach, and in the salary and emoluments pertaining thereto—as will authorize the civil courts to interpose upon that ground to restrain an ecclesiastical court in his trial for an alleged offense against the canons and discipline of the church. The contract for employment and for his salary must be construed and enforced by reference to the canons, which form a part of it. If the minister be suspended or deposed for any ecclesiastical offense, his right to the salary and emoluments is gone.

Bird *vs.* St. Mark's Church of Waterloo.—The Supreme Court of Iowa, December, 1883. Reported in 62 Iowa Reports, 567.....Page 201

A parish of the Protestant Episcopal Church, by its admission into union with the diocese of Iowa, and its connection through that with the Protestant Episcopal Church in the United States of America, acknowledges the authority of the constitution and canons of that church, and becomes amenable thereto; and,

according to these canons, a rector canonically elected and in charge may not be removed by his parish against his will; neither may this be done indirectly by the reduction of his salary as contracted for at the time of his election. And, until the dissolution of the pastoral relation in some manner provided for by the canons of the church, he may recover for his services the salary provided in the original contract.

Stack *vs.* O'Hara.—The Supreme Court of Pennsylvania, October, 1881. Reported in 98 Pennsylvania State Reports, 213.....Page 207

By the laws and customs of the Roman Catholic Church in the United States, a priest is liable to be removed from the charge of a congregation in the discretion of his bishop, without trial. He can not, however, be suspended from his priestly functions without specific accusation and trial.

Tuigg *vs.* Sheehan.—The Supreme Court of Pennsylvania, November, 1882. Reported in 101 Pennsylvania State Reports, 363.....Page 215

The organic law of the Roman Catholic Church is to the effect that the church is bound to provide a decent support for its priests. This, however, does not constitute an implied contract on the part of the bishop of a diocese to support the priests therein. No priest can, therefore, in the absence of an express contract, bring assumpsit against his bishop for an amount sufficient decently to support him.

It is in the discretion of bishops of the Roman Catholic Church to decide whether the manner in which a priest performs his official duties, and the nature of his walk and conversation in life are such as to entitle him to support from the church. What circumstances are such as to warrant a bishop in deciding that a priest is not so entitled, considered.

The relation between a Roman Catholic bishop and priest is not that of hirer and hired, or principal and agent.

Ellen Leahey *vs.* John J. Williams.—The Supreme Judicial Court of Massachusetts, 1886. Reported in 141 Massachusetts Reports, 345.....Page 222

On the relations of a bishop of the Roman Catholic Church and a priest in charge of a congregation in his diocese, concerning funds raised by the priest for the benefit of his congregation.

It belongs to a priest in charge of a congregation to make all contracts relating to the temporal affairs of the church, and he is not the agent or servant of the bishop in such matters; that the only control of the bishop over the pastor is by ecclesiastical discipline.

John F. Baxter, Respondent, *vs.* Charles E. McDonnell, Appellant.—The Court of Appeals of New York, March, 1898. Reported in 155 New York Reports, 83.....Page 226

The courts will not take judicial notice of the civil rights and powers of the Holy Roman Catholic Church without any averment or proof on the subject.

The same evidence is required to constitute a "church trust," and to vest a bishop as trustee thereof, as would be required in the case of a layman alleged to be a trustee under like circumstances.

The relation of bishop and priest is not that of employer and employee, but is that of ecclesiastical superior and inferior; and an alleged obligation arising from the laws of the church, and not through a personal promise, on the part of the former to become personally liable for the services rendered by the latter to the church, does not constitute a cause of action in the civil courts.

A priest or minister of any church, by assuming

that relation, necessarily subjects his conduct in that capacity to the laws and customs of the ecclesiastical body from which he derives his office, and in whose name he exercises his functions; and when he submits questions concerning his rights, duties, and obligations as such priest or minister, to the proper church judicatory, and they have been heard and decided according to the prescribed forms, such decision is binding upon him, and will be respected by the civil courts.

While a priest or minister can always insist that his civil or property rights as an individual or citizen shall be determined according to the law of the land, his relations, rights, and obligations arising from his position as a member of some religious body may be determined according to the laws and procedure enacted by that body for such purpose.

The Late Corporation of the Church of Jesus Christ of Latter-day Saints *vs.* United States.—The Supreme Court of the United States, October, 1889. Reported in 136 U. S. Reports, 1....Page 238

Congress had the power to repeal the act of incorporation of the Church of Jesus Christ of Latter-day Saints, not only by virtue of its general power over the territories, but by virtue of an express reservation in the organic act of the Territory of Utah to disapprove and annul the acts of its Legislature.

Congress, as the supreme legislature of Utah, had full power to direct the winding up of the affairs of the Church of Jesus Christ of Latter-day Saints as a defunct corporation, with a view to the due appropriation of its property to legitimate religious and charitable uses, conformable, as nearly as practicable, to those to which it was originally dedicated.

The pretense of religious belief can not deprive Congress of the power to prohibit polygamy and all other open offenses against the enlightened sentiment of mankind.

Joseph Avery *vs.* The Inhabitants of Tyringham.
The Supreme Court of Massachusetts,
September, 1807.

Parker, J.—This action is brought to recover the amount of salary for the year 1803, which the plaintiff claims as the settled minister of *Tyringham* during that period. The declaration states the invitation of the town to the plaintiff to take upon him that office, and the offer of the pecuniary compensation, which they stipulated to pay him toward his support. It then alleges his assent to the propositions of the town, and his settlement in office consequent thereon, his performance of the duties and services of his office, and the arrears of his salary remaining unpaid. These points, as appears from the report of the judge, were all proved or agreed at the trial.

In answer to this demand, the defendants set up a right to discharge themselves from the obligation of this contract at their pleasure; and offered evidence on the trial that they had exercised this supposed right, by voting in a legal town meeting, that they no longer considered the plaintiff as their minister; which vote was prior to the period for which he claims his salary in the present action. This evidence was rejected by the judge, and the question now before the Court is, whether the evidence was, or was not, rightfully rejected.

The vote in this case was unaccompanied with any cause of complaint. It was, in short, a naked expression of the will of the people to dissolve the connection that existed between them and their minister. Thus the question is brought before us, whether towns and parishes have the right of dismissing their ministers at pleasure, without assigning any breach of duty, or immoral conduct against them.

It is not denied that the contract, in this case, was intended by the parties to bind them for some period, longer or shorter. But the defendants contend that there is, by the declaration of rights assured to them, the privilege of putting an end to it at their pleasure. This they

infer from the right expressly secured to all societies incorporated for religious purposes, at all times, to elect their public teachers; and they say that, without a right to dismiss, they can not be said to have, *at all times*, a power to elect. Such a power, being inconsistent with the nature of contracts in general, which, being made between two or more parties, can not ordinarily be dissolved without the concurrence of all, ought to appear very plainly granted by the Constitution, to receive support in a court of justice.

The Constitution, whenever a question arises upon its meaning, must receive such a construction as is reasonable, and conformable to its general tenor and spirit. The object of its framers, and of the people who adopted it, with respect to the clause under consideration, unquestionably was, to secure to the citizens the liberty of electing pastors, whose religious tenets they approved, and to contract with them for their support. The term *contract*, used in the Constitution, imports something more durable than a mere temporary connection, dissoluble at the will or caprice of either of the parties. It is true the religious societies are left at liberty to make such a contract, and for such term of time as shall be agreed between them and their minister; but the contract once made, it is subject to all such rules of law as govern other engagements. Here no term of time is expressed, during which the ministerial connection is to subsist. But, considering the established usage of the country, known to the contracting parties; the nature of the duties to be performed, which peculiarly require permanency in office; the solemnity of the act, which testifies the assent of the minister and his people—it would certainly seem that the connection, thus established, was to endure for life, unless some stipulation to the contrary should be expressed. Add to this the provision made by our laws for the first settled ministers in new countries, to have a considerable portion of land in fee, and the use of other land during their ministry, and no doubt will remain,

that our Legislature has always considered the office of a religious teacher durable as his life, unless otherwise provided by the original terms of his settlement, or unless dissolved by a breach of contract on his part, or by a merited loss of that character for purity of morals, and Christian virtue, which is essential to the due performance of his sacred functions.

But it is said the Constitution has provided that parishes, etc., shall, *at all times*, have the privilege of electing their teachers, and that this privilege cannot be enjoyed without the right of dismissing them when they please. This construction is certainly violent, and by no means consistent with the reasonable sense and import of the words. If this doctrine be true, the minister who is settled to-day, may be dismissed to-morrow; and thus a connection, which, for the interests, temporal and spiritual, of both parties, would seem to require stability, would be as uncertain as the tempers or views of the various characters which compose a parish or religious society. How inconsistent this would be with the intentions of the parties at the time of making the contract, and how incongruous, upon this idea, is the term *settlement*, used by the parties, need not be urged.

The true construction of the words relied upon undoubtedly is, that, at all times when a vacancy exists, the people shall have the privilege of electing and contracting with their ministers. They shall not have one imposed upon them by any hierarchy, shall not be subject to tithes, etc., but shall choose for themselves, and pay in their own way.

I can not, therefore, entertain a doubt that the contract made between a minister and his people, in terms like the one before us, continues for the life of the minister. Whether it may not be dissolved by neglect of duty, immoral conduct, or flagrant unsuitableness of character, need not now be decided, as nothing of this sort is alleged against the present plaintiff. It may not be amiss, however, to observe that the nature of the office implies

a contract to preserve an irreproachable character for the moral and Christian virtues; and that whenever gross misconduct, or omission of duty, shall be proved against a minister suing for his salary, my apprehension is, that he will be deemed to have forfeited all rights resulting from the sacred profession he has abused; in addition to which, the people connected with such a minister, by resorting to an ecclesiastical council, a tribunal coeval with the settlement of our country, will be sure to find a remedy, by the removal of a man who has given them reasonable cause of disgust. I am of opinion, in the case before us, that a new trial ought not to be granted. . . .

Sedgwick, J.— . . . This was a contract made and entered into between a Congregational minister, and the inhabitants of a town, constituting, in this case, one parish. It appears to me to have been made and conducted in the forms usual in such cases in our country. The church calls the minister; the town, at a legal meeting, concurs in the invitation, and vote the salary; the minister, after solemn consideration, accepts the invitation; at the time appointed he is set apart to his office, according to the forms of their religious sect to which the parishes belong; and in this case it is agreed that he continued faithfully to exercise and perform the various duties of his office, and particularly during the term for which he demands his salary. Some of these facts are contested by the defendants. . . . . .

The counsel for the defendants contend, in effect, that the office of a minister, about whose invitation and settlement such solemn deliberation and formality were had, is an office determinable at the pleasure of the minister or people; or that, at most, it is an office to be holden from year to year. They agree that by the laws and usages of the country, previous to the establishment of our State Constitution, a minister, thus elected and ordained, held his office, with all its rights and privileges, during his life; unless the contract was sooner dissolved by the mutual consent of the parties to it, or by such misconduct of the

minister, as, in some way consistent with the discipline of the sect to which he belonged, should have the same effect. It is impossible to hold any other opinion on this point, from a bare perusal of the statutes of the former province of *Massachusetts Bay*, relating to the subject. But, in further confirmation of the opinion, four unanimous decisions of this Court are now recollected. These decisions were, it is true, applied to contracts made before our State Constitution; and that now under consideration was entered into at a period since.

And it has been strongly insisted and relied upon, in behalf of the defendants, that the Constitution has virtually repealed the pre-existing laws; and the third article of our declaration of rights, which gives to towns, etc., the right, *at all times*, of electing their teachers, and contracting with them for their support, has been urged upon the attention of the Court, as conferring also a right, at all times, to create a vacancy, as necessary to the exercise of their right of election.

The Legislature, by declaring that ministers, as soon as they are settled, shall be considered as inhabitants of the towns where settled, and entitled to all the rights and privileges of such inhabitants, have given an explanation of this article by no means consistent with that contended for on the part of the inhabitants. They must have held the office to have a greater permanency than a mere tenure at will, to annex to it rights not acquired in ordinary cases, but by a considerable residence. It is worthy of observation that the mode of settling ministers has continued in every respect the same, since the establishment of the Constitution, as it was before. It is a pretty general practice in the country, on the introduction of a minister to the charge of a parish, to give him, besides the annual salary agreed upon, an estate in land in fee, or in lieu of a sum of money adequate to the purchase of a place of residence. Public provision has also been made by government appropriating a lot of land, besides the parsonage, to the first settled minister, of newly-settled

towns in fee. These facts operate very strongly, in my mind, to show the public and general impression in the country, *that a settlement of a minister, under a contract for an indefinite period,* is a *settlement for life.* . . .

The anxious regard which the framers of the Constitution have displayed for the religious instruction of the people, most effectively negatives a construction of that instrument which reduces the security of a minister for his salary, below that which a laborer has for his bargained wages. This instrument has given, or rather restored, to the people the power of making contracts with their public instructors; what is there, then, that shall invalidate these contracts? It is said to be impossible that the people should have, "*at all times*" the power of contracting *anew,* unless they have power to dissolve and annul an existing contract; or, in other words, to break it at their pleasure. The same mode of reasoning would apply to any other contracts. A man has by law an absolute right to dispose of his property or his services at his pleasure; but having, in any supposed case, exercised that right, his power is so far restrained, as the other party is interested in the subject of the contract. If he has made a disposition of his property, it is no longer his to contract about, and this is equally true in a contract for future labor or service. He can make no *future* engagement which would impair the rights of a party with whom he had previously contracted.

So far is the Constitution from establishing the construction contended for by the counsel for the defendants, that it irresistibly implies directly the contrary conclusion. Let the *second* and *third* articles of the declaration of rights for this purpose be candidly and impartially considered, and the intention of those who framed, and of those who adopted and ratified that instrument, so far as respects our present purpose, cannot be doubted. In language strong and energetic, the religion of Protestant Christians is *established.* Liberty of conscience is *secured.* Provision is made for the support and maintenance of

public Protestant teachers of religion and morality. The exclusive right of electing their public teachers, and of contracting with them for their support and maintenance, is guaranteed to religious societies; and it is made their duty, *at their own expense*, to make suitable provision for the institution of the public worship of God. After all this, it cannot reasonably be believed that the Constitution has prohibited the making of a contract by the parish with a minister for his *permanent* settlement and support; because it would be impossible, with such a construction, to obtain the important objects so explicitly declared. And it is most manifest, as has been already suggested, that in our statutes there is the strongest implied legislative construction that a minister has a stability, in the tenure of his office, beyond that contended for in the present instance; and I have no doubt that generally, and I believe universally, since the adoption of the Constitution, the same construction has been practically adopted by parishes in their contracts with their ministers. . . .

Parsons, C. J.— . . . This article of the Constitution has, without doubt, made some alteration in the ecclesiastical establishments of the State. Under the Colonial laws, the church members in full communion had the exclusive right of electing and settling their minister, to whose support all the inhabitants of the town were obliged to contribute. And when the town neglected or refused suitably to maintain the minister, the county court was authorized to assess all the inhabitants a sum of money adequate to his support. Under the colony charter no man could be a freeman unless he was a church member, until the year 1662; and a majority of the church constituted a majority of the legal voters of the town. After that time, inhabitants, not church members, if freeholders, and having certain other qualifications, might be admitted to the rights of freemen. In consequence of this alteration, a different method of settling a minister was adopted, under the provincial charter. The church made the election, and sent their proceedings

to the town for their approbation. If the town approved the election, it also voted the salary and settlement. When the candidate accepted, he was solemnly introduced to the office by ordination, and became the settled minister, entitled to his salary and settlement under the votes of the town. If the town disapproved, and the church insisted on its election, it might call an ecclesiastical council; and, if the council approved the election, the town was obliged to maintain the person chosen, as the settled minister of the town, by the interference of the Court of Sessions, if necessary; but if the council disapproved, the church must have proceeded to a new election.

First Parish in Brunswick *vs.* Dunning.
Supreme Court of Massachusetts,
May, 1811.
Reported in 7 Mass. Reports, 445.

Curia. When a minister of a town or parish is seized of any lands in right of the town or parish, which is the case of all parsonage lands, or lands granted for the use of the ministry, or of the minister for the time being, the minister, for this purpose, is a sole corporation, and holds the same to himself and his successors. And in case of a vacancy in the office, the town or parish is entitled to the custody of the same, and for that purpose may enter and take the profits, until there be a successor. Every town is considered to be a parish, until a separate parish be formed within it, and then the inhabitants and territory not included in the separate parish, form the first parish; and the minister of such first parish by law holds to him and his successors, all the estates and rights which he held as minister of the town before the separation. . . .

Silsby *vs.* Barlow *et al.*

The Supreme Court of Massachusetts,

October, 1860.

Reported in 16 Gray's Reports, 329.

Chapman, J.—The plaintiff in this bill, as executor of the will of Joseph Lawrence, who died on the 21st of February, 1859, seeks the aid and direction of the Court in respect to a bequest of ten shares of bank stock " to the Baptist Society in Pocasset, Sandwich, the yearly interest of which is to be appropriated to the support of their minister, while time shall last."

By the testimony of William A. Barlow, and by the church records, it appears that in April, 1832, a Baptist church was organized at the village of Pocasset, and has ever since maintained its existence. There has been during the same time, a meeting-house, in which worship has been maintained for a considerable portion of the time. It is owned by pew-holders, some of whom are members of the church, and others are not. There is also what he denominates a society; but it has never been organized or incorporated; it has never held any formal meetings nor kept any records. It consists of those who attend public worship at the meeting-house, whether members of the church, pew-holders, or others. Barlow has been elected the agent of the church, and appears and answers on its behalf, and on behalf of the society claiming the legacy. On the one hand the plaintiff contends that the church is not the legatee, that the society has no such existence as enables it to take the legacy, and that for want of an existing legatee, the legacy is lapsed. It becomes necessary, therefore, to consider the true character of the church and society.

A church is understood, among those whose polity is congregational or independent, to be a body of persons associated together for the purpose of maintaining Christian worship and ordinances. A religious society is a body of persons associated together for the purpose of

maintaining religious worship only, omitting the sacraments. A church and society are often united in maintaining worship; and in such cases the society commonly owns the property and makes the pecuniary contract with the minister. But in many instances societies exist without a church, and churches without a society. Churches are not corporate bodies, and commonly have no occasion for the exercise of corporate powers. By our statutes their officers have sufficient corporate powers to enable them to hold any property, that may be given to their church. Originally all our religious societies were corporate bodies. The towns at first exercised parochial powers, most of the people of this State being of one denomination. But as varieties of opinion sprang up, it became necessary to separate the parochial from the municipal business, and the parishes formed separate organizations. Other religious societies were incorporated by special acts; but many congregations remained unincorporated. Some persons had conscientious scruples against corporations, and others preferred to manage their religious affairs in a different way. The Statute of 1811, Chapter 6, Section 3, was enacted for the benefit of such persons. It enabled unincorporated religious societies to take and hold property, manage, use, and employ the same, choose trustees, agents, and officers therefor, and constituted them corporations so far as might be necessary. . . .

The legacy in question not being given to the church, Mr. Barlow is not entitled to receive it. But the persons who usually attend worship at the meeting-house, whether members of the church, pew-holders, or others, constitute such an unincorporated religious society as is provided for in the Revised Statutes, Chapter 20, Section 25; and they may choose an agent or trustee pursuant to that section, to whom the legacy should be paid. He should be chosen by the male members, who are over twenty-one years of age. As the legacy is to constitute a permanent fund, it will probably be most convenient for them to have a full

and perfect organization under the statute; but they must judge of the expediency of such a course.

The Elder or Minister, Deacons and Trustees of the First Baptist Church in Hartford *vs.* Witherell and others. Decided in the Court of Chancery, New York, 1832. Reported in 3 Paige's Chancery Reports, 296.

This was an application for an injunction. The complainant's bill stated, in substance, that previous to October, 1813, a Baptist church or society was organized in Hartford, in fellowship with, and under the government of the regular Baptist association of that part of the State of New York. That on the 9th of October, 1813, A. Norton and wife sold and conveyed to that society, by the name of "The elder or minister, deacons, wardens, or vestrymen, and their successors in office, of the First Baptist Church in Hartford," a lot of ground for the purpose of erecting thereon a Baptist meeting house, for the sole and only use of the said Baptist church and society, or congregation, as such, in regular standing and fellowship with such association. That a meeting-house was erected on the lot by the said society, and the expense thereof was defrayed by a sale of the pews. That the society, though not legally incorporated, conducted their temporal and spiritual affairs in harmony, until October, 1829, when the defendant, G. Witherell, their officiating elder or minister, and the other defendants, together with those composing a majority of the church, entered upon and pursued a course of conduct so proscriptive, unchristian, and utterly at war with the principles of the Baptist Church and of Christianity, toward the minority of the church and society, or congregation, that the latter felt themselves bound to dissent from their proceedings, and to appeal to the Washington Baptist Association, which was the regular tribunal constituted by all the Baptist churches in the County of Washington, to take cognizance of, and decide upon all ecclesiastical grievances of that and the like nature; a decision of which association, or of a council appointed by them, was final and conclusive, unless appealed from. That in August, 1831, an ecclesiastical council of the

association assembled, and after hearing the complaint of the minority, the council decided that such minority was the regular Baptist church in Hartford. That the minority being thus recognized as the regular church, and the decision of the council not being appealed from, they caused themselves to be duly incorporated, under the act of the Legislature, in November, 1831, and elected nine of their number trustees of such incorporated society; and that the certificate of their election and incorporation was duly acknowledged and recorded. That the complainants afterward possessed themselves of the meeting-house and other temporalities of the church, except the communion vessels and the records of the church, which some of the defendants withheld from them. That the complainants employed a Baptist clergyman, in regular standing, to preach for them and administer the ordinances of the church; but when they opened the church on the Sabbath for divine worship, the defendant Witherell, acting in concert with the other defendants, obtruded himself into the pulpit, and excluded the complainant's minister from preaching, and that the defendants then took possession of the church, which they still retained. The complainants also stated that the corporators whom they represented owned more than two-thirds of the meeting-house, and that the defendants and those who adhered to them owned less than one-third; and that the defendants, since the decision of the council, had wholly withdrawn themselves from the fellowship, communion, and government of the Baptist association. The bill prayed that the custody and control of the meeting-house and other temporalities of the church might be decreed to belong to the complainants and their successors, to the end that the same might be appropriated to the uses for which the house was originally erected; or that an account might be taken of the interests of the complainants, and of the corporators they represent, in the meeting-house and pews, and that the defendants might be compelled to pay them the amount

thereof for the benefit of their church and society. The bill also prayed for general relief; and for a preliminary injunction, restraining the defendants from occupying the pulpit or impeding the complainants from celebrating divine worship in the church by a Baptist minister in regular standing, and from using or interfering with the temporalities of the church.

Notice of the application for an injunction was given to the defendants. And they put in an affidavit and certificate, showing that on the 6th of September, 1831, in pursuance of the usual notices given, by the defendant Witherell, from the pulpit, a meeting was held for the purpose of incorporating the society; that five of the defendants, together with another person, were chosen trustees; that two of those persons, who were elected to preside at that meeting, certified the election of such trustees, and also certified that the corporation was to be called and known by the name or title of "The Trustees of the First Baptist Church and Society of the town of Hartford"; and that the certificate was duly acknowledged and recorded, as required by the statute.

The Chancellor (Walworth, May 15th, 1832): It is evident, from the affidavit on the part of the defendants, that there are two corporations, or bodies claiming to be corporations, contending for the possession of this meeting-house. If the only contest between the parties is as to which is the corporation legally entitled to the possession of the temporalities of the church or society originally formed in Hartford, I think the complainants have mistaken their remedy. They should have settled that right either by an action of trespass against the individuals who took possession of the pulpit, or by an action of ejectment to recover possession of the meeting house. By referring to the statute relative to the incorporation of religious societies (*3 R. S. 295, Sec. 4*), it will be found that the trustees of a church or society, when legally incorporated, are authorized to take into their possession all the property of the society, whether the same was given

directly to such church or society, or to any other person for their use; and they are to hold such property as fully and amply as if the right or title thereto had been originally vested in the trustees. I think the only rational construction which can be given to this part of the statute is, that if the grantor or any other person held the estate originally in trust for the church or society, the legal estate is transferred to the corporation whenever the requisites of the statute are complied with, so as to render them legally competent to take property in their corporate character.

In the case of *The Trustees of the Philadelphia Baptist Association vs. Hart's Executors (4 Wheaton's Rep., 1)*, the Supreme Court of the United States decided that an unincorporated association could not take land by devise to them in the name of their society, and that a devise of that description could not be executed by a court of chancery, as a charity by the common law. But, in a subsequent case, the same court sustained a bill by the nominal trustees of an unincorporated religious society, to protect their right to a lot of ground, granted for the use of such society by the name of "The German Lutheran Church." *(Beatty & Ritchie vs. Kurtz, 2 Peters' Rep., 566).* And in the late case of *Inglis vs. The Sailors' Snug Harbor (3 idem., 114)* they held a devise valid, which provided for the vesting of the property in a corporation to be thereafter created. Similar decisions have been made in several of the State courts in respect to lands granted or devised for pious uses, or other purposes of charity. *(1 Greenleaf's Rep., 271; 9 Mass. Rep., 44.)* At the time the deed of Norton and his wife was executed, conveying the property to this society, by their associate name, the statute was in existence, by which the members of the society were authorized to incorporate themselves whenever they thought proper; and by which statute it was declared that the legal title to property thus conveyed should, in that event, rest in the corporation. The legal title being in the corporation which was first properly

constituted, the parties must be left to their legal remedy to ascertain whether the complainants are entitled to the possession of the property, or the corporation of which a part of the defendants are trustees, if there can be any doubt on that subject.

It may, however, be proper, as it may save unnecessary litigation to these parties, to state briefly my views on that question. The complainants appear to have acted on the supposition that the decision of the ecclesiastical judicatory, that a certain portion of the members of the Baptist church in Hartford were heterodox in doctrine or practice, and were not the true church, must have legal effect upon the incorporation of the members of this religious society. But I apprehend that in this they have overlooked the distinction between the congregation, and the church strictly so called, which comprises only a part of the congregation or society. The church consists of an indefinite number of persons, of one or both sexes, who have made a public profession of religion; and who are associated together by a covenant of church fellowship, for the purpose of celebrating the sacrament, and watching over the spiritual welfare of each other. But a religious society or congregation, as recognized by the third section of the statute for the incorporation of religious societies, is, with us, what is usually denominated a poll parish, in some of the neighboring States. It consists in a voluntary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, etc. Although a church, or body of professing Christians, is almost uniformly connected with such a society or congregation, the members of the church have no other or greater rights than any other members of the society who statedly attend with them for the purposes of divine worship. Over the church, as such, the legal or temporal tribunals of this State do not profess to have any jurisdiction whatever, except so far as is

necessary to protect the civil rights of others, and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories, to which they have voluntarily subjected themselves. But, as a general principle, those ecclesiastical judicatories cannot interfere with the temporal concerns of the congregation, or society, with which the church or the members thereof are connected. It follows, from this view of the subject, that these defendants, although they have been rightfully excluded from the communion and fellowship of the Baptist church, on account of anti-sabbatarianism, or some other heresy, as suggested by the complainants' counsel, yet they may still not only be legal voters as members of the congregation or society, bu they may be elected trustees, and have the management of the temporal concerns of the congregation.

The affidavits on the part of the defendants shows that the incorporation of the society, on the 6th of September last, was made upon due notice from the pulpit, in the usual form, as prescribed by the statute; and that the members of the congregation generally attended and voted for trustees. Although one of the notices must probably have been given by Elder Witherell, after the decision of the ecclesiastical council, this did not render the notice invalid. It is not pretended but that he was at that time the minister in fact of the congregation; although, as a member of the schismatic part of the church, the council had decided against him. If I am correctly informed as to the usages of the Calvinistic Baptists, it is to ordain their clergymen to the work of evangelists, or ministers of the gospel at large, and not as the ministers of any particular churches or congregations; and they preach the gospel and administer the ordinances by virtue of that general authority, and not in consequence of their connection, by church membership, with a particular church. Although, as a member of this church, Elder Witherell may have been rightfully excluded from church

fellowship with the Baptist Association of Washington County, it is not alleged in the bill that the council had any authority to deprive him of the privileges of the ministry. And they certainly had no right to remove him from his situation as minister of any particular society or congregation, without the consent of the majority of the members thereof; or of their legally constituted trustees, if they were incorporated. My opinion, therefore, upon the facts before me, is, that the corporation organized on the 6th of September succeeded to the temporal rights of this society; and that the trustees of that incorporation are legally entitled to the possession and control of the meeting-house and other temporalities of the congregation.

The fact that the corporators whom the complainants represent own two-thirds of the pews, cannot alter the rights of the parties. The grant of the pew in perpetuity does not give to the owner an absolute right of property, as in a grant of land in fee. The grantee is only entitled to the use of the pew, for the purpose of sitting therein during divine service. *(Sayer's Rep., 177; 1 Phil. Rep.,* 323*;* 3 *Picker. Rep.,* 344*;* 4 *New Hamp. Rep.,* 480; 7 *Picker. Rep., 138.)* But the owner of the pew may maintain case, trespass, or ejectment, according to the circumstances, if he is improperly disturbed in the legitimate exercise of his legal right to use his pew for that purpose.

The question whether the trustees of this society can lawfully change the nature of the institution, as originally established, cannot be decided between the present parties. If the defendants, as trustees of the corporation which has the legal control of the temporalities of this society or congregation, abuse the trust reposed in them by the corporators or those for whose benefit they hold the property, and misapply the funds of the society, I am inclined to think this court, at common law, has power to compel them to account for such misapplication; notwithstanding the provision in the Revised Statutes excepting religious incorporations from the visitorial power

which is expressly given to the chancellor in relation to ordinary corporations. *(2 R. S., 461; Art. 2.)* But it must be a most plain and palpable abuse of power, that will induce this court to interfere as to any dispute growing out of religious or sectarian controversies. In the case of *The Attorney-General vs. Pearson (3 Meriv. Rep., 264),* to which I was referred, on the argument, as a leading case on this subject, Lord Eldon did interfere to prevent the trustee of a church erected for Trinitarian Protestant dissenters from being converted into a Unitarian chapel; although a great portion of the members of the congregation were said to have embraced the new doctrines. It must, however, be recollected that the chancellor was there administering the equity of the statute *(43 Eliz., Ch. 4),* relative to charitable uses; which statute is not in force here. His lordship puts his decision upon the ground that the court is bound to see the trust executed according to the intention of the original founders of the charity, without inquiring whether the doctrines intended to be taught in that particular church be right or wrong. In the case under consideration I presume the original founders of the Baptist church in Hartford, in conformity with the generally received opinion among Calvinistic Baptists, believed the holy Sabbath was of divine institution; and that they intended such doctrines should be taught in that church and congregation. Upon that supposition, if Elder Witherell is permitted by the trustees to inculcate a different doctrine in his public discourses in this church, I presume Lord Eldon would consider it such a departure from the original establishment as to justify his interference. Even in that case, however, he would require the facts to be stated in the bill, so that the defendants might take issue thereon. Where this Court is obliged to administer a trust, the Chancellor cannot put his conscience into the keeping of any ecclesiastical or other tribunal. But the nature of the original trust, and the particulars in which it has been violated, must be stated in the pleadings; so that the court may

see in what that violation consists. For aught that appears on this bill, the council of the association may have decided against Elder Witherell because he preached some other doctrine, from the pulpit, inconsistent with the original foundation of the society, as anti-sabbatarianism; but which this Court might consider a political rather than a religious heresy. I confess I have always entertained serious doubts whether any civil tribunal in this State could interfere to prevent the majority of the corporators in a religious society from introducing such changes, in the doctrines or modes of worship in their churches, as they might deem expedient; and which they could introduce through their trustees, elected in the manner prescribed by law. For myself, although my opinions are fixed and settled as to the essential doctrines of Christianity, as taught in the church to which I belong, I am unwilling, as a civil judge, to assume the responsibility of deciding upon the correctness of the religious tenets of others, either in matters of faith or otherwise. Neither am I prepared to say that it would be right, or expedient, to adopt the principle of Lord Eldon here, where all religions are not only tolerated, but are entitled to equal protection by the principles of the Constitution. Upon Lord Eldon's principle, a society of infidels, who had erected a temple to the goddess of Reason, could not, upon the conversion of nine-tenths of the society to Christianity, be permitted to hear the word of life in that place where infidelity and error had once been taught. And upon the same principle, the newly created equity jurisdiction in a neighboring State might find itself constrained to order some of the parishes within its limits to employ religious teachers who should inculcate the doctrine of witchcraft, as it was taught in their churches at the time of their first organization.

If courts are unwilling to go these lengths, they must abandon the principle, or assume the responsibility of deciding for the consciences of others what are and what

are not essential differences of opinion in matters of faith, as well as of practice.

Without pursuing this subject further, it is sufficient for the decision of this application to say, there is nothing in this bill to authorize the Court to grant the relief which is now asked for against these defendants.

The motion for an injunction is therefore denied, with costs.

Shannon *et al. vs.* Frost *et al.*
The Court of Appeals of Kentucky,
October, 1842.
Reported in 3 B. Monroe, 253.

Chief Justice Robertson delivered the opinion of the Court.

In this case two discordant and dislocated parties of a Baptist church, as originally organized in Frankfort, are litigating their respective claims to the use of a house of public worship, erected by that church, on the ground conveyed in 1827, by Henry Crittendon and wife, to Reuben Anderson, James Shannon, Benjamin Hickman, Robert Johnson, and Henry Wingate, in trust "for the use and benefit of the Baptist Society in the town of Frankfort, known by the (name of) the Frankfort Baptist Church, of the county of Franklin."

On the 27th of March, 1841, James Shannon and six other members of the said church were excommunicated by a vote of a majority of the other members. The expelled members, associating with some other persons professing the same religion, organized themselves into a separate community of Christians, and, having elected three persons as trustees to fill vacancies occasioned by the deaths of Anderson and Hickman, and the removal of Johnson from Kentucky, they procured from the County Court of Franklin a ratification of that election. Afterward, insisting on their right still to enjoy, to some extent, their accustomed use of the house built for and still occupied by the original church, they took possession and made periodical uses of it, without the consent and in defiance of the prohibition of that church. Collisions and complaints, unpleasant and injurious to both parties, ensued and became apparently so determined and aggravating as to leave no hope of voluntary reconciliation or peace. To setle this disagreeable controversy, and secure the exclusive and undisturbed possession of the house, the members of the church, as originally constituted, invoked the intervention of the civil power by filing a bill (in the

name of a committee appointed for that purpose), for enjoining Shannon, Dudley, and all others co-operating with them, from using the house or disturbing the complaining party in the peaceful and exclusive use and enjoyment of it for devotional services.

One circuit judge having granted the injunction as sought in the bill, another dissolved it before an answer had been filed; and, on application to one of the judges of this court, it was reinstated in a modified form by the following order:

"Not doubting the jurisdiction of the civil tribunals of the commonwealth to protect Christian societies in the proper and undisturbed enjoyment of their religious exercises, the rightful enforcement of their ecclesiastical discipline, and the peaceful occupancy and use of their property in their own way, and according to the laws of the land; and being satisfied that the allegations of the bill in this case (being admitted to be true, as they must have been, on the motion to dissolve the injunction), a *prima facie* case is exhibited, authorizing the Chancellor to enjoin the defendants *from preventing the complainants and their associates from enjoying, without obstruction, the use of their church building and its appurtenances, and to enjoin them also from exercising any control over said property, or the use thereof, and from all intermeddling therein, as trustees or otherwise*—I, George Robertson, Chief Justice of Kentucky, do therefore reinstate the injunction in this case, excepting only so far as it might be understood as inhibiting the defendants, as citizens, from participating in the proper use of the house, as people generally are permitted to enjoy it, on occasions of public worship, insubordination to the controlling influence of the complainants and their associates as an organized ecclesiastical body, entitled to the government of their church, as charged in their bill, until the contrary shall be made to appear. G. Robertson, Ch. Jus., Ky.

"To the Clerk of Franklin Circuit Court."

After the reinstatement of the injunction, the persons

who were made defendants answered the bill, denying that the expulsion from the church was either regular or valid, or for any good cause; insisting that they still had a right, as an organized community of Christians, to use the house as a place of social worship as often as one night in every week, and two days in every month, and asseverating that they never claimed or attempted to exercise any control over it for any other purpose or to any greater extent.

On the final hearing, the circuit judge, being of the opinion that the Statute of 1814 (2 Digest, 1347) does not apply to this case, decreed a vacation of the appointment of new trustees; a removal of the three survivors of the original trustees, Shannon, Johnson, and Wingate, and an election of five new trustees, by all the white members of the church, as constituted before the expulsion of a portion of them, and appointed a commissioner to hold and superintend their election, and report the result to the court.

The defendants have appealed, and the complainants have assigned cross errors.

In revising the decree, the first and most radical question which presents itself is, whence the Statute of 1814 applies to the case in any respect.

That enactment is in these words:

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky,*

"That if any society or sect of Christians, in any part of this commonwealth shall heretofore have associated, or hereafter shall associate themselves in congregational form, and shall have acquired, or hereafter shall acquire, a piece or lot of ground, for the purpose of erecting thereon a house of worship, graveyard, and pound for horses; and shall have heretofore received, or shall hereafter receive, the title of said ground, by devise or conveyance to trustees, for the use and benefit of said society or congregation, and it shall become necessary, by reason of the death of removal of the said trustees, or through any

other cause, to appoint new trustees to support the legal estate, it shall and may be lawful for said society or congregation, by the election held by its members, or by those appointed for that purpose, according to the rules of said society, to elect or appoint, as often as may be necessary, any number of trustees not exceeding five; and to produce the names of said trustees so elected or appointed, to the county court of the county where the house of worship may be situated; who shall order the said names to be entered on their records; and thereupon said trustees so elected or appointed, shall be vested with the legal title of said land, for the use and benefit of said congregation; and shall have power to do any legal act in conducting the same, which may be necessary for the uses aforesaid; and to maintain any action or actions of trespass, or other action for the safe keeping or preservation of said property, which may be necessary for that purpose. *Provided, however*, that if any schism or division shall take place in said congregation or church from any other cause than the immorality of its members, nothing in this act shall be so construed as to authorize said trustees to prevent either of the parties so divided, from using the house or houses of worship, for the purposes of devotion, a part of the time, proportioned to the numbers of each party. *Provided*, that nothing in this act shall be construed to authorize the minority of any church having seceded from or been expelled, or excommunicated from the church or congregation, from interfering in any manner, in their appointment for similar purposes, which may have been made by the body or the major part of such church or congregation."

After a careful examination of this statute, we concur with the court below in the opinion that it has no application to, or bearing upon, the case now before us.

The chief object of the enactment seems to have been to prescribe a mode for transmitting to new trustees the legal title to church property after the death or removal of the trustees to whom it had been originally conveyed,

and to vest such appointees with all the powers of their predecessors, qualified, *as to the former*, by the provisos. The act does not, in either letter or purpose, apply to a church, or the trustees of a church, when the church property is held by the trustees or the heirs of the trustees to whom the title was first conveyed or devised as a charity.

"Said trustees," in the first proviso, evidently refers only to the proximate antecedent, to wit, the trustees provided for by the act itself, and elected by the church.

Moreover, the power of the Legislature to prescribe the duties or curtail the conventional rights of the original trustees, as recognized by the law existing when their title first accrued, might be, at least, seriously doubted.

But the Legislature had undoubted authority to provide that, if a church should choose to avail itself of the Act of 1814, it should do so, subject to the condition that the new *trustees*, in the event of a division in the church, resulting from any other cause than immorality, should not be authorized, *by anything in the enactment*, to prevent either of the divided parties from using the house of worship for devotional purposes, "a part of the time, proportioned to the number of each society."

As churches are unincorporated bodies, the legal title of their trustees would descend to the heirs of those trustees, and thereby the beneficiaries might be subjected to great inconvenience, and even privation. To obviate such consequences, the Act of 1814 authorizes the transmission of the title to the appointees of the church, on prescribed conditions. This, together with a perspective restriction as to the quantity of church ground, was the sole object, and is the only effect of that enactment. It does not apply, therefore, to a church which has not elected any trustees as successors of those in whom the legal title of its property was first vested; and consequently it is totally inapplicable to this case, unless the trustees elected by the expelled and minor party are legally invested with the title to the house and ground

of the entire church so constituted before the dismemberment.

But this cannot be. First, because a majority of the original trustees still survived, and were competent to act in their proper judicial capacity. And, second, because a minority, if unexpelled, had no right to elect trustees for the majority, and the expelled persons had no right whatever to appoint trustees for the church of which they were no longer constituent members.

Consequently, the rights of the parties in this case must depend on the terms and legal effect of the conveyance from Crittenden and wife, for the benefit of the then organized Baptist Church of Frankfort, and on the acts of that church for governing and preserving itself, as a distinct Christian society, and on the common law of the land.

What then are those rights as thus tested?

This Court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. And these we must decide, as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.

We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this Court.

For every judicial purpose in this case, therefore, we must consider the persons who were expelled by a vote of the church, as no longer members of that church, or entitled to any of the rights or privileges incidental to or resulting from membership therein.

As the conveyance from Crittenden was to the use of

the Baptist church, as an organized body of professing Christians in Frankfort, every member of that church has a beneficial interest in the property thus conveyed, so long as he or she shall continue to be a member, but no longer. It is only as a constituent element of the aggregated body, or church, that any person can acquire or hold, as a *cestui que trust*, any interest in the property thus dedicated to that church: *Curd et als. vs. Wallace et al.* (7 Dana, 195). Such is the effect of this conveyance to Congregational uses, and such the civil law of our State; and upon this foundation alone must our decision rest. The judicial eye of the civil authority of this land of religious liberty can not penetrate the veil of the church, nor can the arm of this Court either rend or touch that veil for the forbidden purpose of vindicating the alleged wrongs of the exscinded members. When they became members they did so on the condition of continuing or not, as themselves and their church might determine. In that respect they voluntarily subjected themselves to the ecclesiastical power, and cannot invoke the supervision or control of that jurisdiction by this or any other civil tribunal.

Then, not being even members of the church to whose use the ground was conveyed, the appellants seem no longer to be entitled to any beneficial interest in that property, nor to any other right which this Court can either enforce or recognize; and consequently the old church, as organized at the date of that conveyance, and still subsisting, must be deemed to be entitled to the exclusive use and enjoyment of the property for all the purposes for which it was first dedicated. And, as that right is of the character of a trust, is it not the duty of a court of equity to uphold it and secure its full and undisturbed enjoyment? Such was the purpose of the modified reinstatement of the injunction. The unanswered bill alleged an exclusive right in the complaining party, and a persevering and vexatious disturbance of that right, which authorized a restraining process. And the answer

and the proofs, now in the record, though they may show an apology for that disturbance, do not change the essential facts of the case as to the civic rights of the parties. The injunction might, therefore, with propriety, have been perpetuated or prolonged as the only or best civil means of preserving peace, preventing multiform litigation, and securing the undisturbed enjoyment of the property to those who, according to the law of the Court, seem now to be entitled to claim the exclusive use. . . . .

Were it admitted that there might be an election to supply vacancies before the death or removal of all the original trustees, yet, even on that hypothesis, the church itself should be the sole arbiter of the question whether, or when, or how, it shall elect new trustees. The appellants, not being members of that church, nor entitled, therefore, to any beneficial interest in the church property, should not, more than other strangers, have any voice in that matter, either in the election, or in deciding whether there shall be one. Nor could the Court, therefore, have any authority, at their instance and against the will of the old church, to require an election. The bill does not ask the Court for any aid in the appointment of trustees, *ex-officio*, nor require the election of trustees.

We are consequently of the opinion, that the enlightened Chancellor went too far in requiring an election, and also in prescribing the time and manner of it, and in providing that the persons who had been expelled might cast votes, which we would consider as illegal, as they would have been hopeless and unavailing. . . .

But the necessary consequence of the view we have taken of the proprietary or usufructory rights of the parties is, that there can be no reversal of the decree on the errors assigned by the appellants. Having once associated themselves with many others, as an organized band of professing Christians, they thereby voluntarily subjected themselves to the disciplinary and even expulsive power of that body. The voice of the majority has

availed against them. They have, by that fiat, ceased to be members of that association, and with the loss of their membership may have lost all the privileges and legal rights to which, as members, they were ever entitled. Their only remedy now is, therefore, in their own bosoms, in a consciousness of their own *moral* rectitude, and in the consolations of that religious faith and those Christian graces which, under all temporal trials, will ever sustain the faithful Christian and adorn the pathway of his earthly pilgrimage. Their expulsion ought not to brand them with "*immorality.*" In this record there is no proof of immoral conduct in either the popular, the ethical, or the biblical sense. They were expelled for alleged non-conformity and contumacy adjudged against them, without a formal trial or hearing, by a dominant majority, as fallible, perhaps, as themselves; self-doomed to the uncontrolled will of a majority of a church selected by themselves, they can obtain no redress in this forum. If their sentence be unjust, the only appeal is to the omniscient Judge of all. . . .

Petty *et al.*, Trustees of Parish of Bellport, *vs.* Tooker *et al.*
Decided in the Court of Appeals of New York.
Reported in 21 N. Y., 267.

Justice Selden delivered the opinion of the Court, March, 1860, as follows:

This is a contest between two sets of individuals, each claiming to be trustees of the parish of Bellport; and the action is brought to recover possession of the church edifice, and the lot upon which it stands; from which the plaintiffs, as they allege, have been excluded by the defendants. The first position taken by the defendants is, that their title to the property can not be tried in this action, but that the plaintiffs must resort to the mode prescribed by statute for testing their rights.

The present statutory provision on the subject is contained in the Code. Section 432 provides that an action may be brought by the Attorney-General, in the name of the People of the State, upon his own information, or upon the complaint of any private party, against any person who shall usurp or intrude into any public office, or "any office in any *corpororation* created by the authority of this State." This no doubt is, in ordinary cases, the most appropriate and convenient way of trying the title of anyone, to a corporate office; and in cases where no right of property is invaded, it is frequently the only way. But the legal title of the church and lot in question here, is absolutely vested in the trustees of the corporation; and I am inclined to the opinion that if those who are justly entitled to that office have been wrongfully excluded from the possession and control of the property, they may maintain an action in their own names to recover that possession. I have, however, given to this question but slight examination, for the reason that, in the view I take of the case, it is not important to settle it. Neither have I examined very critically to see whether the case shows an actual exclusion of the plaintiffs by the defendants; but have assumed, as the counsel on both sides seem to have assumed, that an ouster of the plain-

tiffs in their character as trustees, though not as individual corporators, is established. The question, then, is upon the right of the plaintiffs to be considered as the trustees of the corporate body. The corporation itself was unnecessarily and improperly made a party, and will be disregarded.

The whole theory of the plaintiff's case rests obviously upon the assumption that, as the religious society in Bellport was, from its commencement in 1836 to its incorporation in 1849, Congregational in its character, this feature of Congregationalism entered as an element into the act of incorporation, so that the society became incorporated, not merely as a religious, but as a Congregational, society.

This assumption is clearly unfounded. Corporations formed under the third section of the Act of 1813 have no denominational character, nor can such character be in any manner engrafted upon them. That portion of the members organized into a separate body, called the church, may belong to a peculiar denomination, but it has no power to impress its distinctive character upon the corporation, so as to render it ineffaceable by the voice of a majority of the corporators. These two bodies, *viz.*, the corporation and the church, although one may exist within the pale of the other, are in no respect correlative. The objects and interests of the one are moral and spiritual; the other deals exclusively with things temporal and material.

The existence of the church proper, as an organized body, is not recognized by the municpal law; nor does its existence or non-existence, or its denominational character or connections, in any manner affect the legal nature of the corporation. Each as a body is entirely independent, and free from any direct control or interference by the other; and yet it is easy to see that the majority of the corporators, if so disposed, may, through their control over the property and revenues of the society, exercise an important incidental influence upon the character and

destinies of the church. The present case illustrates the manner in which this influence is exerted. The plaintiff's counsel is clearly mistaken in supposing that the meeting of the 28th of November, 1851, wrought the change of which he complains. Even if that had been a meeting of the members of the *parish* of Bellport, instead of being, as it was, a meeting of the *inhabitants* of the village of Bellport, its proceedings could *per se* have had no effect upon the sectarian character of the society. That depended upon the rules and ordinances of the church, with which the corporation, as such, had nothing to do. Neither the proceedings of that meeting nor the subsequent action of the Presbytery in organizing a Presbyterian church were in themselves of any legal consequence. They were only important as indicative of the views and sentiments of a majority of the members of the society, and of the manner in which they would be disposed to exercise their legitimate corporate powers.

The change in the character of the congregation, of which the plaintiffs complain, has been brought about, not by the proceedings of the Presbytery, or the resolutions of the society, but by the action of the trustees in employing a Presbyterian clergyman, and opening the meeting-house to his ministrations. This they had a legal right to do. The trustees are the representatives of the corporate body, and the statute invests them with extensive powers. They are entitled to the possession and management of all the property of the corporation, and are empowered to exercise its entire administrative functions. The Legislature has been careful to guard against the abuse of this authority, by providing, in Section 8, that the salary of the minister shall be regulated not by the trustees, but by a majority of the corporators, at a meeting called for that purpose. Subject to this important and most effective check, the trustees have the undoubted power of determining by whom the pulpit shall be occupied. It is quite apparent that this power, which the statute plainly confers, must of necessity give

to the trustees and a majority of the corporators, when united, virtual control over the forms and ordinances to be observed. The act for the incorporation of religious societies was obviously framed with a view to, and in accordance with, that just and sound principle which lies at the basis of all our civic institutions, *viz.*, that in every organized society, the controlling power should be in the hands of the majority.

This may, in some instances, as it does in the present instance, operate with severity and apparent injustice, by enabling those who have recently become members of the society, if in a majority and so disposed, to change its religious character and modes of worship, against the will of its original founders and chief contributors. But the evil arising from these rare cases is more than counterbalanced by the effect of this legislation in putting an end to religious controversy and removing from the civil tribunals a species of litigation with which they are in general quite unqualified to deal.

But while our laws have thus secured to every incorporated religious society the power, as a general rule, to modify, from time to time, its ordinances and forms, so as to harmonize with the views and wishes of the majority of its members, they also afford to those who may desire it ample means of guarding against any radical change. If a body of persons of homogeneous views, upon becoming incorporated, are desirous of maintaining unchangeable forms, a uniform faith, and permanent religious connections, there are two modes in which this object can be accomplished. One is, by causing their church edifice and lot to be conveyed to the society, upon the express condition that it should be forever thereafter devoted to the purposes of religious worship by a congregation maintaining a certain faith, and observing certain prescribed ordinances and forms. Such a condition inserted in a deed to the society, if definitely and clearly expressed, would be valid, and

would no doubt operate as an effectual guaranty against any change in the religious character of the society.

But the provisions of the act itself, under which such societies are incorporated, suggest another mode by which permanence and steady and unchangeable forms may be secured. Section 7 provides that no person shall become a member of such society after its incorporation, and entitled to vote at any election, unless he has been "a stated attendant" on the worship of the society for at least one year before such election. Now the society has obviously, through its trustees, full power to determine what persons it will thus admit to membership. It is under no obligation, more than any other organized association, to receive obnoxious persons, or those likely to create either disturbance or division. The trustees own and control the church edifice, and are expressly authorized, by Section 4, "to regulate" the renting of the pews, and may of course adopt such rules on the subject as they may deem expedient. The act evidently contemplates that the society will, or at least may, discriminate among those desirous of uniting with it. The latter portion of Section 7 provides that "the clerk to the trustees shall keep a register of the names of all such persons *as shall desire* to become stated hearers in the said church, congregation, or society, and shall therein note the time when such request was made; and the said clerk shall attend all such subsequent elections, in order *to test the qualifications* of such electors, in case the same should be questioned."

This provision looks to a formal application, in each instance, to the corporate authorities for admission into the society; and the trustees may no doubt adopt such regulations that no pew can be rented originally, or sold, or assigned to a new occupant, without their previous consent, or even that of the society itself.

If, however, a society, instead of adopting these appropriate and effectual precautions, chooses to throw open its doors to the public at large, and invite new members, irrespective of their personal character or religious ten-

dencies, they have no reason to complain that the powers and privileges of their new associates, whom they have voluntarily received, and of whose contributions they avail themselves, should be the same as their own.

It follows from these principles, that the change in the religious character of the parish of Bellport has been produced by the exercise, by the trustees, and the majority of the corporators, of their legitimate powers. The idea upon which the plaintiffs rest the regularity of their election as trustees, *viz.*, that the defendants and those who elected them, were to be regarded as seceders from the society, has no legal foundation. Seceders from Congregationalism, in a religious sense, they may have been; but this would not disfranchise them as corporators. The corporators are those who can vote at the elections; and their qualifications are, as we have seen, prescribed by the statute. If they have been stated attendants upon the worship of the society for one year next before the election, they are entitled to vote. Nothing else is required; and it is plain that there is no power which can add to these qualifications, or which can properly say to one who possesses them that unless he also adheres to the peculiar faith and governmental forms of the society he cannot vote. Every election at which persons are prohibited from voting upon any such ground is, of course, illegal. Secession from the doctrines or faith of the church is a purely religious offence, and the ecclesiastical judicatories alone can take cognizance of it.

As between the two elections, therefore, of the 21st and 24th of February, 1852, to which the plaintiffs and defendants, respectively, trace their title as trustees, there is no doubt which is to be considered legitimate and regular. It would be difficult, under the proof, to discriminate between these two elections, in respect to the regularity of the meetings at which they took place. Each purports to have been called pursuant to the statute; and hence if their proceedings had been properly conducted, there would have been nothing but the order of time to

give precedence to either. But the case shows that at the election on the 24th, all those members of the corporation who adhered to the Presbyterian organization were prohibited from voting, on the ground that they were seceders from the society. This is entirely fatal to that election, and no rights dependent upon it can have any validity. No such objection attaches to the election of the 21st, and there is nothing whatever to impeach its regularity. The defendants, therefore, who deduce their title by regular succession from this election, must be regarded as the legitimate and rightful trustees of the corporation.

The judgment of the Supreme Court must be affirmed.

All the judges concurring,

Judgment affirmed.

Bouldin *vs.* Alexander.
The Supreme Court of the United States,
December, 1872.
Reported in 15 Wallace U. S. Reports, 131.

Statement of the case.

Appeal from the Supreme Court of the District of Columbia, in a case arising out of a controversy in an unincorporated religious society of colored persons, in Washington, calling themselves the "Third Baptist Church."

From about the 1st of September, 1857, a small number of colored persons were in the habit of associating in prayer-meetings and other religious conferences at the house of one Albert Bouldin, a colored man from Virginia, who had been licensed to preach, and was so styled the Reverend Albert Bouldin; he being a chief actor in the assemblages. The persons were, at first, few in number, feeble in resources, and without any church edifice. But, under Bouldin's leadership, they increased in strength, and, after a certain time, went to work to raise money to build a meeting-house; Bouldin taking the lead in the whole matter, the temporal part as much as the spiritual, and, being at once pastor, collector, treasurer, and chief agent in the enterprise, and getting into his hands most of the moneys collected. Having bought a lot on which to build a church, he took a deed for it in his own name, and proceeded to have the church built, which, under his superintendence, was done: a building now standing, on the corner of Fourth and L streets, Northwest. Some of the chief persons in the work, however, were apparently dissatisfied with Bouldin's having the title to the property in his own name. Hereupon, April 1, 1864, he and his wife conveyed a large part of the lot, including that on which the church was built, but apparently not the whole of the lot, to four persons, Joseph Alexander, Charles Alexander, John Middleton, and William Minor, as trustees, to be used, with the building on it as "the Third Colored Baptist Church of the City of

Washington"; these persons, in return, giving him their promissory notes and a deed of trust on the property to secure them; the notes being for a sum which Bouldin represented to them that he was to advance from his private funds beyond moneys received by him from collections.

A congregation had by this time been organized, with sufficient regularity, and in full conformity with the constitution of the General Baptist Church of the United States, in which the congregational form of government prevails. "The Rules of Church Order," a part of the Baptist Manual, an authoritative book in the Baptist denomination, required that seven trustees should be elected in January of each year, but provided that in case of any omission to hold an election then, the election should be held "at the next regular meeting for business." And the minutes of the church, which had been kept apparently with essential order by Bouldin, one Lee, or some other person elected as clerk from the origin of the church till the time when troubles arose, showed that seven persons, Joseph Alexander, Henry Watson, Henry Scott, John Wiggins, John Middleton, William Laws, and W. J. Minor, were duly elected trustees, at a regular meeting of the church for business, on the 15th of February, 1867; the ordinary meeting, apparently, not having been held. These persons, the minute-book showed, had received about 200 votes of a not much larger number cast. After the troubles arose, the minute-book passed from hand to hand, and Bouldin swore in the lower court that this minute about the election was a forgery; and that no such election had ever taken place. The books were brought into the Supreme Court, and showed some erasures and cutting out, apparently of some leaves, but little or nothing beyond Bouldin's statement to prove that this particular minute was not entitled to as much respect as others in the book. Minutes following it were made by Bouldin himself.

After the completion of the church edifice, dissensions

arose in the congregation, and the church was divided into two parts, each asserting itself to be the true "Third Colored Baptist Church." On the 7th of June, 1867, one of these parties, being a very small minority of the church, and being probably about fifteen in number, including Bouldin, resolved to "turn out four trustees," without naming them, and proceeded to elect four others in their stead. The persons thus elected were Manson Robinson, Julius Bouldin, William Pearson, and Charles Pearson. The attempted ejection of the old trustees was without citation, trial, or charges preferred. It was also at a time when, according to the rules of the church, an election of trustees was not in order; the rules that exist in Baptist churches generally providing that trustees shall be elected in January of every year, or in case of failure to hold an election, at the next regular meeting for business. A few days afterward, on the 10th or 17th of June, 1867, the same minority proceeded to "turn out" forty-one members of the church, also without citation or trial. Having thus gotten the control of the church property in their own hands, some of the persons elected to be trustees in place of the former trustees caused the locks to be taken from the church doors, and new locks to be put on in their places, and they, with Bouldin, claimed and obtained possession of the property from that time forth. Hereupon the four persons to whom Bouldin and wife had conveyed the property in trust, and the seven that had been elected trustees in February, 1867, worshiped in a school-house, or in a place called Miller's Hall; retaining the old organization, with a new preacher named Jefferson, who had been licensed under Bouldin, and who (Bouldin having been dismissed by the party shut out from the church) was now acting temporarily as preacher, or by way of "supply."

On the 28th of September, 1867, the four trustees named in the deed of the church lot, from Bouldin and wife, and also the seven persons who professed to have been elected trustees of the church, on the 15th of February, 1867, at

the annual election provided for by the general rules of Baptist churches, filed a bill against Bouldin, who had received the money of the church, and who also professed to be a trustee, without, however, any election, and against the will of the persons who professed to have been elected trustees at the meeting of the minority on the 7th of June, who took possession of the church, together with some other trustees, in deeds of trust for Bouldin. The bill sought a discovery, and on account of the money received and expended by Bouldin, a release of deeds of trust of the church property given to secure notes held by Bouldin, a surrender and cancellation of the notes, alleging them to have been satisfied, and the restoration of the possession of the church property to the complainants as the lawful trustees. It sought also an injunction against future interference by the defendants with the church property, against the sale of the notes, and against sale or foreclosure under the deed of trust. The bill charged that there was a plain mistake in the deed from Bouldin and wife, to the trustees of the church, which it prayed to have corrected. In the lower court a decree was rendered in favor of the complainants, sustaining all their claims, except that reference was made to a master to ascertain and report the state of accounts.

From that decree this appeal came.

Mr. Justice Strong delivered the opinion of the Court.

It is contended that the court erroneously decided the complainants were, at the time of the commencement of the suit, the legally constituted trustees of the church. But it is very evident that Joseph Alexander, Charles Alexander, John Middleton, and William Minor were then trustees for the church property, unless they had been removed by the action of the minority on the 7th of June, 1867. They were nominated as trustees in the deed from Bouldin and wife, and they had never surrendered or renounced their trust. And we think the evidence is satisfactory, that Joseph Alexander, Henry Watson, Henry Scott, John Wiggins, John Middleton, William

Laws, and Willis J. Minor were then general trustees of the church, unless they, or some of them, had been removed by the action of the same minority, on the day last mentioned. It is not to be overlooked that we are not now called upon to decide who were church officers. The case involves no such question. What we have to decide is, where was the legal ownership of the property? The question respects temporalities, and temporalities alone. That the attempt made on the 7th of June, 1867, to remove the trustees then holding was inoperative, is not to be doubted, in view of the facts of the case. Those who held under the deed were not removable at the will of the *cestui que use*, and without cause. And had there been cause, none was shown. No ecclesiastical authority has decided that the defendants, or any of them, were legitimate trustees of the church, or of its property. Even if it be assumed that it was in the power of the church to substitute other trustees for those named in the deed, it may not be admitted that a small minority of the church, convened without notice of that intention, in the absence of the trustees, and without any complaint against them, or notice of complaint, could divest them of their legal interest, and substitute other persons to the enjoyment of their rights.

It is equally true that the seven persons who sue as church trustees were not removed by the action of the minority meeting held on the 7th of June, 1867. Indeed, that action does not seem to have been an attempt to remove them. It was valid to turn out four trustees, but who the trustees intended were nowhere appears. None were named. In view of the fact that the number was four, it is presumable the meeting had in view the four trustees of the church lot, named in Bouldin's deed, and not the ordinary trustees of the church, those contemplated by the Baptist Church Manual. That manual provides, that in every church seven trustees shall be elected annually, in January, or at the next regular church meeting thereafter. And the church books, which appear to

have been kept with considerable regularity from September 2d, 1857, until this controversy arose, show that on the 15th of February, 1867, at a regular church meeting, the seven persons who with the church lot trustees are complainants in this bill, were elected trustees of the church for the ensuing year. This was before any division took place in the society. It is true Mr. Bouldin testified that the minute of an election was a forgery, and that no such election ever took place. But we are satisfied that he is mistaken. An examination of the minute-book leaves no doubt in our minds that the election was made as claimed by the complainants, and that they were elected by a number of votes averaging more than two hundred. The entry in the minute-book is attested by the church clerk. It is in regular order, and there are subsequent minutes in the same book made by Bouldin himself. The court below was, we therefore think, not in error in holding that the complainants were the legally constituted trustees at the time when this suit was commenced. And if they were the rightful trustees, the decree for any account, for the surrender of the church property, and, indeed, the entire decree made by the court, was a matter of course upon the evidence.

But the appellants insist that the complainants, and those who acted with them, withdrew from the church and formed a new congregation. This, they argue, was a relinquishment of all their rights in the Third Colored Baptist Church. It may be conceded that withdrawal from a church and uniting with another church or denomination, is a relinquishment of all rights in the church abandoned. But there is no sufficient evidence in this case that any new congregation was formed, or that there was any withdrawal from the church, or union with any other. The complainants, and those who acted with them, after the church building had been wrested from the custody of and control of the rightful trustees, and after very many of them had been excommunicated in mass by the small minority, held their religious services

in another place. But they formed no new organizations. They still had the same trustees, the same deacons, and they claimed to be the Third Colored Baptist Church, and as such they were recognized by councils of Baptist churches duly called, and by the Philadelphia Baptist Association, an ecclesiastical body with which the church was associated. That body, it is true, was not a judicatory. Its action was not conclusive of any rights. But the fact that the complainants and those acting with them applied for recognition as the Third Colored Baptist Church, and that the Association thus recognized them, is persuasive evidence that they were not seceders, and that their rights have not been forfeited.

This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with rights of property. As was said in *Shannon vs. Frost (3 B. Monroe, Ky., 253)*, we can not decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons exscinded are not members. But we may inquire whether the resolution of expulsion was the the act of the church, or of persons who were not the church, and who, consequently, had no right to excommunicate others. And, thus inquiring, we hold that the action of the small minority, on the 7th and 10th of June, 1867, by which the old trustees were attempted to be removed, and by which a large number of the church members were attempted to be exscinded, was not the action of the church, and that it was wholly inoperative. In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church. An expulsion of a majority by a minority is a void act. We need not, however, dwell upon this. Certain it is, that trustees are not necessarily communing members of the church. Excommunication from

communing membership does not disqualify them, even if the excision be regular. Still more certain is it that they cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation, or trial, and in direct contravention of the church rules.

Decree affirmed.

The State *ex rel.* H. W. Soares *vs.* Hebrew Congregation "Dispersed of Judah."

The Supreme Court of Louisiana,

March, 1879.

Reported in 31 Louisiana Annual Reports, 205.

Manning, C. J.—The relator is an Israelite, and was a member of the Congregation of the Dispersed of Judah, a corporation organized and chartered under the laws of this State. On June 13, 1877, he was expelled therefrom, he alleges illegally and arbitrarily, and now prays that a writ of mandamus be directed to the officers of the corporation, compelling them to restore him to his rights and privileges of membership.

The answer admits the membership of the relator prior to the date mentioned, and avers that on that day, at a meeting of the congregation, there being present a legal quorum thereof, certain charges were preferred against him of gross misconduct, upon which testimony was received, and of which he was found guilty, and was thereupon expelled by a vote of three-fourths of the members present, which mode of proceedings, it is averred, is in accordance with the constitution and laws of the congregation. The respondent then pleads to the jurisdiction of the court, averring that such expulsion is wholly within the cognizance of the ecclesiastical tribunal, provided by the corporation of which he was a member, and that the civil courts have no authority to inquire into, or revise the same.

The correctness of this return to the alternative writ is verified by the oath of the president of the congregation, and was not traversed by the relator, nor was any proof offered to impugn its truth. The case, therefore, presents the naked question, whether the civil courts can or will revise the ordinary acts of church discipline, or the administration of church government.

The entire separation of Church and State is not the least of the evidences of the wisdom and forethought of those who made our National Constitution. It was more

than a happy thought—it was an inspiration. But, although the State has renounced all authority to control the internal management of any church, and refuses to prescribe any form of church government, it is nevertheless true that the law recognizes the existence of churches, and protects and assures their right to exist and to possess and enjoy their powers and privileges. Of course wherever rights of property are invaded, the law must interpose equally in those instances where the dispute is as to church property as in those where it is not, and it also takes note of, but does not itself enforce, the discipline of the church and the maintenance of church order and internal regulation. The law does not assume, and will not declare, that a particular religious association is more truly the church than another, but each and all of them are permitted to make their own regulations, and to enforce them in the manner each has provided for itself.

This whole subject was maturely considered and elaborately expounded in Watson *vs.* Jones, 13 Wall., 679, where the court says: "In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decisions of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of

their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for." P. 728.

The court refers in that opinion to Harmon *vs.* Dreher, 1 Speer's Eq., 87 (S. C.), as one of the most careful and well considered judgments upon the subject, in which it is said : "It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our Government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether, if held, were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the synod or to his denomination. . . . When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them."

So, too, in Missouri, in the State *ex rel.* Watson *vs.* Farris —it was said, the utter impolicy of the civil courts attempting to interfere in determining matters which have been passed upon in church tribunals, arising out of ecclesiastical concerns, is apparent. It would involve them in difficulties and contentions, and impose upon them duties which are not in harmony with their proper functions. Before a court could give an enlightened judgment it would be necessary to explore the whole range of

doctrine and discipline of the given church and survey the vast field of divine word.

And in Kentucky the binding force and completeness of the church's action is thus stated: "Every person entering into the church, impliedly at least, if not expressly, covenants to conform to the rules of the church, to submit to its authority and discipline. Appellant, when he became a member thereof, placed himself in this condition. . . . Whether in what the church did it acted right or wrong, this court can not approach its precincts to inquire, and is powerless to redress any wrong inflicted on the appellant thereby. By becoming a member of the church he subjected himself to its ecclesiastical power, and neither this nor any other earthy tribunal can supervise or control that jurisdiction." Lucas *vs.* Case, 9 Bush, 297.

And, finally, the rule is enunciated by an approved modern writer thus: "The principle may now be regarded as too well established to admit of controversy, that in the case of a religious congregation or an ecclesiastical body, which is itself but a subordinate member of some general church organization, having a supreme ecclesiastical judicatory over the entire membership of the organization, the civil tribunals must accept the decisions of such church judicatory as final and conclusive upon all questions of faith, discipline, or ecclesiastical rule, and the party aggrieved can not invoke the aid of the civil courts to have such proceedings reversed." High on Injunctions, Sec. 233.

One of the allegations of the petition is that by the expulsion of the relator from the congregation, the right to be buried in its burying-ground will be, or is, denied him, and the celebrated case of Guibard is cited as an instance where the civil courts took cognizance of the refusal of sepulture by the ecclesiastical authorities, and enforced the party's right to burial in consecrated ground. The final decision of that case was by the judicial committee of the Privy Council in England; and courts there

go much further than they do here in enforcing rights appertaining to, or growing out of, ecclesiastical matters. But it is sufficient to say, in disposing of this part of the complaint, that Guibard was dead, and the object of the proceeding in his case was to procure the interment of his body in that part of the Montreal Cemetery which was consecrated, whereas the relator has happily no present need of enforcing his claim to burial anywhere, and, *non constat*, that before he does need it, he will have his ban of excommunication removed, and be restored to full fellowship in the congregation.

It sufficiently appears, from what has now been said, that we think the relator's demand cannot be enforced by the civil courts. The return or answer to the alternative writ set up as grounds, why the peremptory writ should not issue that the relator had been excommunicated according to the rules adopted and in force in the congregation from which he was expelled, and the by-laws in evidence show what these rules were. The judicatory provided by those laws has acted upon the matter, and we cannot go behind its action to inquire whether it acted rightly or wrongfully, justly or unjustly. It is the tribunal to which he submitted himself when he accepted membership in the congregation, and its action is not examinable in a civil court.

It will be observed that we assume, as we are obliged to do in the state of the pleadings and evidence in this case, that the church judicatory was properly constituted, and in the manner prescribed by the constitution and by-laws of the congregation. The return not having been traversed by proof, nor excepted to for insufficiency, is taken as true for the purpose of testing the right to the peremptory mandamus, and that return avers and exhibits the constitution of the body which forms the judicatory, and which passed the sentence of excommunication. The State *ex rel.* Vierra *vs.* Lusitanian Society, 15 Annual, 73. Tucker *vs.* the Justices, 1 Jones (N. C.), 451. People *vs.* Finger, 24 Bart., 341.

The judgment of the lower court sustained the exception to the jurisdiction, and refused the peremptory mandamus. It is correct, and is affirmed.

Peace *et al. vs.* First Christian Church of McGregor.
Court of Civil Appeals of Texas,
December 21, 1898.
Reported in 48 S. W. Reporter, 534.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by the First Christian Church of McGregor against R. M. Peace and others. From a judgment for the plaintiff the defendants appeal. Affirmed. The district judge filed the following findings of fact and conclusions of law:

"Findings of Fact.

"1. I find that there has existed for many years in Texas, and in other States of this country, a body of religious people calling themselves 'Disciples of Christ, or Christians,' and known in the aggregate as the Christian Church, and existing in independent local churches, and having no ecclesiastical tribunal superior to the local church, said local churches being congregational in form of government.

"2. These churches have no formulated creed or articles of faith, but claim to be guided in their faith and practice by the Bible; and it is, and always has been, a fundamental principle with them that nothing more or less than faith in Jesus Christ as the Son of God and the Saviour of man, and obedience to his commands, is to be required to constitute persons Christians, and to entitle them to membership and good standing in said Christian churches.

"3. They hold to immersion exclusively, as Christian baptism, and they teach that baptism, when preceded by faith in Christ, repentance from sin, and a public confession of such faith, is for the remission of sins; but they have never required uniformity in opinion as to this purpose or design of baptism, and it has been their custom and usage from the beginning, and held by them to be in accord with their fundamental principles above stated, to regard and treat as Christian persons from other Chris-

tian denominations, who have been immersed, upon a profession of their faith in Christ, and to receive such persons into membership and full fellowship in their churches, whether or not they believe that baptism is for the remission of sins.

"4. It is also a part of their fundamental principles that missionary societies, conventions, and similar voluntary organizations for Christian work, as well as the use of instrumental music in connection with their worship in the church, are regarded as expedients, concerning which no rule pro or con can be made, but regarding which each local church, or congregation, and each individual is allowed liberty in opinion and practice; and they have generally, since the beginning of the denomination, had their general societies and conventions for missionary work, and each of such voluntary organizations being allowed and having free access to and use of their respective church houses or places of worship in which to hold their meetings and transact their business.

"5. In 1883, some twenty or more persons residing in or near the town of McGregor, in McLennan County, Texas, adhering to the fundamental principles, customs, and usages of said church, as recited in the foregoing paragraphs, organized a local congregation in McGregor, denominated the 'Christian Church of McGregor,' as one of the local churches of that body, adopting and accepting its principles, customs, and usages, as aforesaid; and on November 24, 1883, said congregation purchased from the Gulf, Colorado & Santa Fé Railway Company the lots in controversy in this suit, paying therefor the sum of fifty dollars, raised for that purpose by contributions from persons composing the said congregation, and in the spring of 1884 erected on said lots the present house of worship, with funds contributed for that purpose by the members of that congregation and their friends. Said lots were purchased and the house erected thereon as a place of worship for said Christian Church of McGregor; and said lots were conveyed by said railway company to

W. L. Harrison, A. L. Ament, and J. P. Diffey, original members of said church, as trustees of said Christian Church of McGregor; and the legal title thereto was held by them in trust for the said Christian Church of McGregor, as their place of worship. At the time said lots were acquired and said house was erected thereon, and for a number of years thereafter, the Christian Church of McGregor was composed of persons accepting and adhering to the fundamental principles, usages, and customs of the Disciples of Christ, or the Christian Church, at large, as above set forth.

"6. Within the past ten or twelve years, the Christian Church, or Disciples of Christ, in Texas, have divided into two factions. Those adhering to the principles, usages, and customs above set forth are now designated as the 'Progressive Faction,' and the other as the 'Firm Foundation Faction.' These have become distinct and opposing factions and church organizations, the difference being mainly that the Firm Foundation Faction hold that none have been spiritually baptized, or are Christians, who do not at the time of receiving baptism understand and believe that they are being baptized for the purpose of securing a remission of their sins—'for the remission of sins,' as contradistinguished from 'because of the remission of sins,' as held by some other Christian denominations; and they refuse to receive such persons in their church without baptism, and insist upon excluding such persons from the Christian Church; and the Progressive Faction hold that all persons who have been baptized upon a profession of faith in Christ are Christians, and are entitled to membership in their churches, regardless of their views as to whether or not baptism is for the remission of sins, and without rebaptism, and they oppose the exclusion of any from the churches because of their views of the purpose or design of baptism; the Firm Foundation Faction oppose and do not allow the use of musical instruments in connection with their worship in churches controlled by them, and oppose the formation of

missionary societies, conventions, and like organizations for Christian work, holding that such practices are sinful and in violation of the faith of the church, and forbid the use of their church houses and property by such organizations for meeting purposes; while the Progressive Faction hold that the use of musical instruments in the churches, and the formation of such societies and conventions, are mere matters of expediency, concerning which individuals may exercise their preferences, without affecting their standing in the church; and the Progressive Faction generally use musical instruments in their churches, in connection with their worship, and organize missionary, Christian Endeavor, and ladies' aid societies in their local churches, and participate in the general conventions and general missionary societies of the Christian Church at large.

"7. Immediately prior to September, 1893, the membership in the Christian Church of McGregor numbered about eighty, a large majority of whom adhered to the principles, usages, and customs of the Firm Foundation Faction; but no formal action of the congregation forming the said church was taken, prior to the separation of the two factions during said month, declaratory of its doctrines and principles, or what usages or customs it would follow; nor was any meeting of the members thereof called to discuss or act upon such question; nor was the same in any way submitted to the membership for decision by the elders. Instead, thereof, the elders, who are elected by the members, and who have control and direction of the spiritual welfare of the church, aligned it with the Firm Foundation Faction, and permitted only its principles and doctrines to be taught in the church, and its customs and usages to be followed, and would not permit those adhering and holding in doctrine with the Progressive Faction to hold religious services or preach their principles and doctrines in such church building, and in this they were supported by a majority of the members of said congregation.

"8. In September, 1897, some of the members of the Christian Church of McGregor engaged the Rev. B. B. Sanders, a minister of the Christian Church, to hold a meeting in the town of McGregor, but not in the church building, and announced the fact at the regular meeting of the church, on Sunday, September 12, when L. A. Trott, one of the defendants, and one of the elders of the church, announced publicly in the church that he did not indorse Sanders, and that the church would have nothing to do with his meeting; and on September 16 said Trott and R. M. Peace, another elder, and also defendant herein, published a notice in a local newspaper to the effect that the approaching meeting by Sanders was not authorized by the 'Church of Christ' in McGregor, and that they did not recognize Sanders as a representative gospel preacher.

"9. On September 16, 1897, those members of the Christian Church of McGregor who held with the Progressive Faction (21 in number), claiming to be the original Christian Church of McGregor, and claiming that the other members had departed from the fundamental principles and doctrines of said church, prepared, and on September 20, caused to be filed with the Secretary of State a charter for said church as the 'First Christian Church of McGregor'; and said corporation is plaintiff in this suit.

"10. On September 23, 1897, defendants L. A. Trott and R. M. Peace, elders, as aforesaid, locked the church house, and took possession thereof for themselves, and the other defendants, all of whom adhere to the Firm Foundation Faction, claiming that they are the original Christian Church of McGregor; and defendants now hold exclusive possession of the church property, against plaintiff corporation and those composing said corporation.

"11. The Christian Church of McGregor has been, since about the 12th day of September, 1893, divided into two factions, having no affiliation with each other, and meeting for worship in different places in the town of McGregor; the majority represented by defendants Trott,

Peace, and Jacobson, as elders, and adhering to what is called the 'Firm Foundation Faction,' meeting in the church house situated on the lots acquired in 1883 by the Christian Church of McGregor; and the minority adhering to the Progressive Faction, and composing the plaintiff corporation, meeting in another place, not on said lots.

"12. Those who compose the plaintiff corporation hold to the doctrines and fundamental principles taught and held by the Christian Church of McGregor, at the time the property in controversy in this suit was acquired; and the defendants and the faction represented by them have departed from the doctrines and fundamental principles of said Christian Church of McGregor, in that (1) they deny that persons who have been immersed are scripturally baptized, or are Christians who did not at the time of their baptism believe that baptism is for the remission of sins, and they refuse to admit such persons to membership in said church; and (2) they hold that the use of musical instruments in connection with the worship, and missionary and similar organizations, are sinful; and they refuse to permit those members of the church who favor working through such societies to meet for that purpose in the house of worship belonging to the said Christian Church of McGregor.

"Conclusions of Law.

"The courts of this country have no power to determine for religious bodies ecclesiastical or doctrinal questions, and they have never evinced a disposition to invade that domain, and will only inquire into such questions when property rights become involved and are the subject of litigation, and then only so far as to determine those rights.

"It is a rule of law that, when property has become dedicated to the support of some specific form of religious doctrine, it becomes a trust, and the courts will hear evidence and determine what that doctrine is, regardless of its ecclesiastical, sectarian, or denominational bearing, in order to ascertain the trust, and not permit it to be

diverted to other and different doctrinal uses; and it is the duty of the court to decide in favor of those, whether a majority or minority of the congregation, who are adhering to the doctrines professed by the congregation and form of worship in practice at the time the trust became fixed. In this case the members of the Christian Church at McGregor purchased the lots in question, and paid therefor, and erected the church edifice thereon, from donations by said members and their friends, and procured a conveyance of said lots to certain trustees named, for said Christian Church, and it thereby became immediately dedicated to the principles and doctrines maintained by said church at that time; and though a majority of its members may have changed their views of these subjects, or others become members who never entertained them, yet the indelible stamp of the original doctrine has been placed upon the property, and it is held as a trust for the use of those members who still adhere thereto, however much in the minority, and those having control of the property will not be permitted to apply it to the promotion of doctrines not consistent with the fundamental doctrines of the church at the time and for the benefit of which the trust was created.

"The property was purchased and improved, as shown by the testimony of the only two original members examined, and who are not contradicted, by those who, as a church or religious society, held to the doctrines or teachings of that branch or faction now termed the 'Progressive Faction.' The evidence shows that the Christian Church at large, including that at McGregor, at the time this property was so acquired and improved, was based upon a broad, catholic principle—that all persons who believed that Jesus Christ is the Son of God and the Saviour of Men, and who have been baptized by immersion upon a profession of that faith, are Christians, and entitled to membership in their church, whether baptized into the Baptist, Methodist, or other Christian denomination, and regardless of their views as to the design of

baptism, or whether they were baptized 'for the remission of sins,' or 'because of the remission of sins,' and exercising toward and permitting the exercise by its members of the utmost liberty of thought upon other doctrinal questions, and action in the advancement and dissemination of this fundamental doctrine through missionary and other auxiliary societies. This church believed and taught that baptism was for the remission of sins, the same as the Firm Foundation Faction now believes, but this belief was not made a *sine qua non* to church fellowship, the same liberality of belief being allowed upon this as other doctrinal subjects. The Firm Foundation Faction, as shown by the evidence, hold that, without this belief and it entertained understandingly at the time of baptism, no person can become a Christian, and be entitled to fellowship in the Christian Church, and that all missionary and other auxiliary societies to church work are deemed sinful, and any member who believes otherwise and joins such societies is deemed to be in sin, and is liable to expulsion therefor. The church at McGregor, since passing into the hands of the Firm Foundation Faction, has never expelled any of its members who belong to such societies; but the evidence shows that such were considered by the ruling faction to have sinned by so joining, and to remain in sin so long as adhering to, such societies, and were not expelled through mere indulgence of the church in the violation of its principles, and were liable to expulsion should they remain members thereof, all such societies being held sinful in practice, violative of church doctrine, and forbidden to meet in the church building.

"In the opinion of this court, the differences in the fundamental principles, doctrines, and practices between these two factions of the McGregor Church are radical and irreconcilable; and the doctrines and practices of the defendants, who are in possession of the church property, are at a wide variance from, and largely subversive of, the fundamental doctrines and practices of such church at

the time the property in dispute was dedicated to its support; and the trust imposed by such dedication has been, and is being, diverted from the purposes intended by the founders of such trust; and the plaintiff corporation is composed of those members of said church who adhere to the specific form of religious doctrine, in principle and practice, to the support of which said property was dedicated, and is entitled to recover the possession thereof, and it is so ordered."

Key, J. (after stating the facts)—The evidence fully supports the foregoing findings of fact, which we adopt; and the trial court's conclusions of law, as recited above. upon the controlling questions in the case, are so entirely satisfactory, and so clearly and tersely stated, that we adopt them also. There are some other minor questions presented in the appellants' brief, but they are not of such importance as to require elaborate consideration here. We do not agree with appellants upon any of the grounds assigned for a reversal of the judgment, and it will therefore be affirmed.

Affirmed.

In re First Church of Christ, Scientist, in Philadelphia.
Reported in 20 Pa. County Court Reports, 241.
Application for a charter.

Pennypacker, P. J., Dec. 6, 1897.—The report of the learned Master to whom the above application was referred presents the facts with so much care and clearness that the court is relieved from the greater part of the difficulty in reaching a conclusion. The purpose of the proposed corporation, as appears from the suggested charter, is "to preach the gospel according to the doctrines of Christ, as found in the Bible and stated in the tenets of Christian Science."

Among the tenets so described is: "5. We acknowledge the way of salvation demonstrated by Jesus to be the power of truth over all error, sin, wickedness, and death; and the resurrection of human faith and understanding to seize the great possibilities and living energies of divine life."

Accompanying these tenets are certain rules, of which the first prescribes: "To become a member of the First Church of Christ, Scientist, in Philadelphia, Pa., the applicant must be a believer in the doctrines of Christian Science, according to the teaching contained in the book 'Science and Health, with Key to the Scriptures,' by Rev. Mary Baker G. Eddy. The Bible and the above-named book, with other works by the same author, must be his only text-books for self-instruction in Christian Science, *and for practicing metaphysical healing*."

If the purpose of the proposed corporation were only to inculcate a creed or to promulgate a form of worship, no question could arise, because under the Constitution of Pennsylvania private belief is beyond public control, and there can be no interference with the rights of conscience. But the most cursory examination of the report of the Master upon the testimony, and of the tenets, and of the book of Mrs. Eddy, which is placed upon a level with the Bible in the teachings of this church, shows that there is a Christian faith and a science, not only a belief, but a pur-

pose to accomplish practical results; not only an attempt to educate the community to the importance of the recognition of certain ethical principles, but an effort to establish a prescribed method of practising the art of healing the diseases of the body. Thus the rule to which reference has been made declares that the book shall be the only text to be used in " practicing metaphysical healing." The Master reports that the " maintenance of health and the cure of disease " occupies a large space in the faith of the society. The students of the book have patients, who are to be treated according to the method taught. Thus: " To fix truth steadfastly in your patient's thoughts explain Christian Science to them, but not too soon, not until your patients are prepared for it" (page 412). "Explain audibly to your patients as soon as they can hear it, the utter control which mind holds over body." (page 415.)

The treatment extends to the most serious and fatal of diseases, rheumatism, scrofula, cancer, smallpox, and consumption. " If the case to be mentally treated is consumption, take up the leading points included, according to belief in that disease. Show that it is not inherited, that inflammation, tubercles, hemorrhage, and decomposition are beliefs. . . . Then these ills will disappear. If the lungs are disappearing, that is but one of the beliefs of mortal mind." (page 422.)

The treatment is declared to be efficacious in surgical cases as well as others. " However, it is but just to say that the author has already in her possession well-authenticated records of the cure by herself and her students, through mental surgery alone, of dislocated joints and spinal vertebræ." (page 400.)

Nor is the treatment necessarily associated with conditions of faith and belief. That is, it is not confined in the application to those who are adults and who can determine for themselves whether or not they wish their disease so treated, but it is extended to children and infants, whose health or life may depend upon the accuracy of the judgment of those in whose charge they are placed.

One witness testified before the Master that she would regard it as her duty to withhold medicine from a child or other person to whom her will was law. The book says: "If the case is that of a young child or infant, it needs to be met mainly through the parents' thought. . . . Mind regulates the condition of the stomach, bowels, food, and temperance of children and men, and matter does not. The views of parents and other people on these subjects produce their good and bad results in the health of children. The daily ablutions of an infant are no more natural or necessary than would be the process of taking a fish out of water every day and covering it with dirt." (page 411.)

The patients, young and old, are also to be treated for a compensation, to be paid to those who work the beneficent results. To the question of the Master whether the system permitted any person who was instrumental in making such a cure to receive compensation for the service, the answer was: "Yes, in the sense that Jesus said, 'The laborer is worthy of his hire.'" "Let us suppose," says the book (page 420), "that a surgeon is employed in the one case and a Christian Scientist in the other."

It is quite clear, therefore, that what is proposed is much more than a church, since there is besides to be established a system for the treatment of disease, to be carried into effect by persons trained for the purpose who may receive compensation for their services.

The Act of March 24, 1877, P. L. 42, provides: "It shall be unlawful after the passage of this Act for any person to announce himself or herself as a practitioner of medicine, surgery, or obstetrics, or to practice the same, who has not received in a regular manner a diploma from a chartered medical school fully authorized to confer upon its alumni the degree of doctor of medicine," and a violation of the Act is made punishable as a misdemeanor, with a fine of from $200 to $400 for each offense. The object of this Act manifestly is to provide that, for the practice of an art so difficult and abstruse as the treat-

ment of disease, the person so employed must have had the benefit of the learning and the experience of the past, so far as it can be given by teaching in the medical schools. It establishes a policy for the commonwealth which the courts must be careful not to thwart. To grant this charter would be to sanction a system of dealing with disease totally at variance with any contemplated by the Act of 1877, and different from any taught in " a chartered medical school." It is possible that the method proposed is correct, but the most important of truths which run counter to long-established and popular currents of thought must ever pass through a period of test and trial before they are accepted.

Reforms are proverbially slow. It may be, as we are told in " Science and Health," that to look a tiger in the eye with faith is to send him frightened into the jungle; but men, as they are at present informed, are more apt to rely, however mistakenly, upon rifles. For the treatment of the disease called trichinosis, which is caused by animalculæ breeding in the body and feeding upon the muscles, they depend upon something which may destroy the creature rather than upon a faith, however sincere, that its ravages will do no harm. Should they in the lapse of time become convinced by the teachings of " Science and Health " that their course is erroneous, no doubt a future Legislature will repeal the Act of 1877, but for the present its policy must be enforced.

The learned Master, while expressing the thought " that some people may lose their lives through refusing to employ the means which are ordinarily under Providence successful, reports, with evident reluctance, in favor of granting the charter. We can not sustain this recommendation. For the reasons given, the charter is refused.

Lawyer and others *vs.* Cipperly and others.
Decided in the Court of Chancery, New York, Dec. 4, 1838.
Reported in 7 Paige's Chancery Rep. (N. Y.), 281.

This was an application by John D. Lawyer, a clergyman, and a part of the elders and deacons of Zion Church, an incorporated Evangelical Lutheran society, for an injunction to restrain the defendants, who were the trustees of the corporation, from interfering with or impeding the complainants and their adherents in the occupation of the church belonging to such corporation, for public worship and the administration of religious ordinances; and from expelling the complainant Lawyer from the possession of the parsonage and the glebe lands belonging to such corporation, or from proceeding at law to recover the same. The grounds upon which the application rested, were as stated in the bill, that Lawyer had been duly nominated by the church council and elected by a majority of the male members of the church and congregation; but that the defendants, the trustees of the corporation, refused to sanction such election, or to suffer him to preach or administer the ordinances in the church, and were about to disturb him in the enjoyment of the parsonage and glebe. On the part of the defendants the regularity of the election was denied. And they also insisted that Lawyer and his adherents had abandoned the faith and doctrines of the Evangelical Lutheran Church, by refusing to adhere to the Augsburg confession of faith, in many particulars stated in the answer. It also appeared that Lawyer and his adherents had withdrawn themselves, and were endeavoring to withdraw that church from the Hartwick synod, a superior church judicatory to which Zion Church had attached itself many years before.

The Chancellor (Walworth)—I am inclined to think that the objection is well taken that the corporation is not made a party to this proceeding to deprive its trustees of the control of the temporalities of the church. The objection to such proceeding is that a decision against these individual trustees will not be binding upon their suc-

cessors, who will represent the corporation only. Neither will a decision in their favor settle the right claimed by the complainants as against the corporation; for the new trustees could not set up a decision against the complainants in favor of the present defendants, in bar of a new suit to try the same question over again. It is not necessary for me, however, in this case, to put my decision upon that technical ground. Neither shall I attempt to decide the question as to which party, if either, has departed from the original standard of faith which existed in this society at its foundation. If that standard was the first or original edition of the Lutheran confession of faith, as drawn up by Philip Melanchthon, the friend and fellow-laborer of the great German reformer, to be presented to the Diet of Augsburg in 1530, then it is probable that the complainants and their adherents have departed from that standard, in some particulars at least. But if the standard of Zion Church at the time of its incorporation, or rather at the time of its original formation, was the Augsburg confession, as afterward modified by Melanchthon himself, and as explained by Francke, the celebrated professor in the University of Halle, nearly two centuries afterward, the complainants and those who are acting with them are perhaps as near to that standard in doctrine as their opponents. It probably is not questioned by either party that the principal doctrines of the Augsburg confession are, and ever have been, considered as the standard of faith in all the Evangelical Lutheran churches in the United States. But whether all the churches of that denomination of Christians, either here or elsewhere, have literally adhered to the doctrine of consubstantiation, or the mystical impanation or union of the real body and blood of Christ with the unchanged elements of bread and wine in the Eucharist, or to the doctrine of auricular confession and of private absolution, or of the necessity of baptism to salvation, certainly admits of some doubt. It is well known that a great diversity of opinion existed between the early Bohemian, German,

and Swiss reformers in relation to the presence of the Savior in the sacrament of the Lord's supper. The Hussites may have believed in the doctrine of transubstantiation. But if they did, they still differed with the Romanists; who held that the real body and blood was contained in each element, and therefore refused the cup to the laity as unnecessary. Luther and Melanchthon both originally held to the doctrine of impanation, or consubstantiation. Zwinglius understood the words "this is my body" in a figurative sense only; while Calvin, who repudiated the doctrine of the real presence in the consecrated elements, insisted upon the special spiritual presence of our Savior during the administration of the sacrament, and against all these doctrines the *anathema maranathas* of the Papal church were directed, by the canons of the Council of Trent. It is believed, however, that Melanchthon himself, some years before his death, adopted the Calvinistic doctrine on that subject; as did many other Lutheran divines who did not adopt the principles of the German Reformed Church generally. And it is not improbable that this and some of the other questions which have produced the recent schism, have continued as disputed or unsettled points of doctrine in many of the Lutheran churches down to the present day. I cannot perceive, however, why this difference of opinion should necessarily lead to a division in this branch of the Christian church. One of the doctrines inculcated by Luther and Melanchthon, and by all the other reformers who joined in the original Augsburg confession, and which was also the doctrine afterward taught by the pastor of Glaucha in his biblical lectures at the University of Halle, allowed for a difference of opinion in minor particulars in reference to all human creeds. And they adopted the sacred scriptures alone as the only infallible standard of faith and practice. And such is now, or at least ought to be, the doctrine of all Evangelical Lutheran churches which profess to be based upon the reformation principles contained in the confession of faith promul-

gated by the German reformers, at the Diet of Augsburg, on the memorable 25th of June, 1530.

In the case of *The Baptist Church of Hartford vs. Witherell (3 Paige's Report, 296)*, I had occasion to explain my views of the difference between the officers and communicants of a church as a spiritual body, and the trustees and congregation of the church or society as the owners of the temporalities thereof, under the general provisions of the act relative to the incorporation of religious societies. This society was incorporated under the Act of 1784 *(1 Greenl. Laws, 71)*, which, in respect to Presbyterian and other churches not particularly specified, is not materially variant from the subsequent statutes, as reenacted in the several revisions of the laws. The tenth section of the Act of 1784 provides that the trustees, who, by a previous section, have the control and management of all the property and temporalities of the church, shall not thereby be adjudged to have the power to fix the salary of the minister; but the salary shall be fixed by the electors of the congregation, at a meeting to be called for that purpose. And the salary or stipend, when so fixed, is to be ratified and confirmed by the trustees by an instrument under the corporate seal; after which the trustees are authorized to pay the same out of the revenues of the church, congregation, or society. The eleventh section, which I believe is not found in the subsequent revisions of the Act, declared that nothing in the Act should be construed or adjudged to abridge or affect the rights of conscience or private judgment, or to change the religious constitution or government of the church, congregation, or society, so far as respected or in any wise concerned the doctrine, discipline, or worship thereof. The statute therefore recognized three distinct classes or bodies as existing in the religious corporation, and defined their relative powers and duties, the church, or spiritual body, consisting of the office-bearers and communicants; the congregation or electors, embracing all the stated hearers or attendants on divine worship who

are competent to vote for trustees; and the trustees of the corporation, who have the control of all its temporalities, to be improved, used, and managed by them for the benefit of all the stated hearers and the communicants, as far as is practicable. The church, or spiritual body, as to its doctrine, government, and worship, is to be governed and regulated by its own peculiar rules, which neither the trustees nor the congregation have any right to interfere with or alter without the consent of the church itself. Whether the church, as such, has a right to change its government, discipline, or mode of worship, or its standards of faith, with the consent of the trustees and congregation, is a question which does not arise here; as it is denied that the trustees or the congregation have ever assented to a change in this respect, if any has in fact been made by the complainants and their adherents. But to authorize the calling and settling of a minister, if he is to preach and administer the ordinances in a building belonging to the congregation, or is to have the use of the parsonage and glebe, or any other part of the corporate property, it is not sufficient that he should be called or elected by the church only, as the spiritual body, according to its general usages; but his employment must also be sanctioned by the trustees, as the representatives of the temporal rights of the whole congregation. And if he is to receive any support or compensation for his services, either from pew rents or from subscriptions, or other ordinary contributions by all, or any of the stated hearers of the congregation, which subscriptions or contributions for the support of a settled minister are a part of the revenues of the congregation or society within the intent and meaning of the statute, the payment of such stipend must also be authorized by the electors at a regular meeting called for that purpose; or the trustees will violate their duty by suffering him to be thus employed and paid.

It will be seen, from this view of this subject, that the provisions of the statute are well adapted to preserve

harmony between the communicants of the church and the other members of the congregation; which latter class it is of more importance to conciliate, and to bring within the hearing and under the influence of the gospel, than it is to impart spiritual benefit to those who are already members of the church as office-bearers or communicants.

If the trustees, without any reason whatever, should obstinately refuse to employ a minister who was every way acceptable to the great mass not only of the church but also of the congregation, and who had not in their opinion departed materially from the standards of faith adopted in such church, I am not prepared to say this court would not correct such a flagrant breach of trust by removing them from their office as trustees; so as to allow the congregation to elect others in their places. It must, however, be a case of a palpable breach of trust which will authorize this court to interfere; and it should not be done in any case where the church and congregation were very nearly equally divided as to the propriety of employing any particular person as their minister. And it is the right if not the duty of the trustees to withhold their assent, where there is reason to believe that the employment of the individual selected by the majority of the church, be he orthodox or not, will destroy the peace and harmony of the congregation or of the church. In such cases, also, ministers of religion, who profess to be the disciples of Him who taught the religion of peace and good-will in all the relations of life, should not suffer themselves to be the means of fanning the flame of discord or sowing the seeds of strife in any church or congregation with which they are connected.

For these reasons, and without intending to decide the question as to which party is right in the religious controversy which is uniformly distracting the Evangelical Lutheran Church in this part of the United States, I am satisfied that the defendants have not abused their trust. The complainants, therefore, are not entitled to any relief which it is in the power of this Court to give.

The application for an injunction must be denied, with costs to be taxed. And the temporary injunction agreed on by the counsel of the parties, is dissolved.

Sutter *et al. vs.* The Trustees of the First Reformed Dutch Church.

The Supreme Court of Pennsylvania,

1862.

Reported in 42 Pennsylvania St. Reports, 503.

Appeal from the Common Pleas of *Philadelphia.*

Lowrie, C. J.—It was in 1809, that a colony from the German Reformed Congregation of Philadelphia united together to organize the church now called the First Reformed Dutch Church of Philadelphia. On the 15th of January, 1810, they obtained a charter of incorporation uder the general law, and by the name of the Evangelical Reformed Congregation of Philadelphia, and certain rules and regulations, called also Fundamental Articles, were made part of their charter by reference. As yet they had formed no ecclesiastical connection with any general ecclesiastical organization, but they evidently had and retained the intention to form one, for they reserve the right in their charter, which declares that nothing in it shall "hinder the said congregation from uniting with any other Christian denomination, whenever it shall appear to a majority of the members to be to their advantage."

. . . . . .

Now the sum of all this detail is this: that in 1809 and 1810, this congregation was organized, not as an independent church, but with the purpose of becoming a part of some Reformed or Presbyterian denomination, or general organization thereafter; that in April, 1813, it did thus complete its organization by becoming a member of the Reformed Dutch Church, by a unanimous vote, and has remained so ever since; that in 1860 it called a pastor who did not belong to their church, and whom the proper authorities refused to admit as a minister; and that because of this they have attempted, by a majority of the votes of a congregational meeting, to secede from the general body, and carry with them the common property, without any regard to the wishes of the minority.

We have said nothing about the reasons why the classis refused to admit a strange minister into their denomination as a minister, because it is everywhere admitted that their reasons, so far as they are theological, are not to be reviewed by us. Moreover, we do not see that the classis needed to give or to have any reasons for refusing such an admission. If they should refuse to install, or should oust one of their own regular ministers for not believing some special doctrine on which the church had always allowed ministers to differ, without suffering in their ministerial standing, this would bring up the principle of Goham's Case in England, and might require us to investigate the fact of such allowed difference, in order to prevent a sudden and arbitrary change from operating unjustly. Nothing of that kind is here. The congregation called a strange minister, subject to the approbation of the classis; for in no other way could such a call be orderly. The call was null, or only inchoate, until he should be admitted into the classis. He was not admitted, and therefore the majority attempted a secession. There is no theology in the question raised on such a fact. And whether the majority had a right to pass an act of secession or not, involves no question of theology.

We have simply the question whether the act of secession was a regular exercise of lawful authority. If it was, very many must be taken by surprise. There are only two or three of the original members left, and they voted for the connection that has always since existed. Every other member joined the congregation, recognizing it as a portion of the Reformed Dutch Church, and knowing it therefore to be subject to the laws and constitution of the church. There, then, we are to find the standard by which we are to judge this act of secession. And if the church is to be free, we can judge it by no other. If the State imposes law upon it for its internal relations, beyond which it is necessary for the order and security of the State, then it is not free. Of course this does not admit that any church may arbitrarily or fraudulently abuse

or set aside its own laws to the injury of anyone, and without any chance of civil redress.

But we need not enlarge upon this, for no one pretends that this secession is not a violation of the constitution of the Reformed Dutch Church, unless this congregation had a right of secession, reserved by implication from the circumstances of the union, or allowed by law as growing out of these circumstances.

Now let it not be supposed that there is any practical analogy between such a secession and that of our American Revolution, or that which the Southern States are now attempting to establish; or that anything we may say can have any reference to these. All such secessions profess to rise above civil law, and to be themselves acts of the law-making power, and become in fact so, when the portion that is left has no power adequate to prevent the consummation of the act.

But this act of secession is made *under authority*, under civil law, is not to be suppressed by the power of the other party, and the State is appealed to to correct what is wrong in it. Here, therefore, the appeal is not to the vague generalities of natural law, unless it may be where positive law fails to furnish us a guide. The State, not having itself instituted any positive law for the case, we must resort to the laws to which the parties have always heretofore submitted, and which were of their own adoption. Do we find in these any right of secession?

It is supposed to be involved in the fact that from 1809 to 1813 this congregation was independent of the Reformed Dutch Church; that during that period it bought the lot and built the house which were the predecessors of the present ones, and the proceeds of the sale of which helped to buy and build the present ones, and, therefore, the secession involves no division of the property from its original purposes, unless the original doctrines have been abandoned. But we have shown that one of the original purposes of the congregation was to form just such a connection as this which is now attempted to be

violated, and that it was formed and maintained for over forty-five years, and that every member of the congregation joined on the faith that the law instituted by that act of union, was the law of this congregation in common with others. It follows, therefore, that the secession is a violation of that law, unless we can find some other authority for it that is superior to that law, or provides a mode by which the congregation may set it aside. In tracing associate succession, we do not regard principles merely, but also regularity of form and action.

It is supposed that because in the charter the right is reserved in a majority to make such a connection, a majority may dissolve. But we do not see it so. According to the mere terms used, that article is fulfilled, and the right exhausted by the exercise of it in the act of union, and we do not see how it can be implied that it was to extend further. Surely no respectable denomination would accept and foster congregations who would reserve a right to separate from it at their pleasure. This they would regard as no better than congregationalism. One of the highest benefits which they regard as belonging to permanent unions is, that all congregations thus united take a greater interest in each other, and the general authority takes an interest in all, and is able to prevent such unseemly strifes as this one. And no doubt another reason is, that, apart from the religious duty of union, there is a real value to society in securing a large unity of opinion in religious and moral principles, and in preventing, as much as possible, that sort of rivalry of opinion and anarchy of principles that weakens the social bond, and endangers the unity of the State or Nation. But we mean not to judge their actions.

It can hardly be supposed that this right of secession of the congregation from its denomination depends upon a congregational majority, as such majorities are very apt to be wrong, especially on exciting occasions, and the fact of majority proves rather power than might. Many nations have been ruined by majorities, and the

minorities, though right, had to share in the ruin. Yet in the constitution and regulation of civil governments, we can have no better practical rule than that of majorities. And where questions are thus decided without agitation or excitement, or the misleading influence of self-interest, they are usually decided rightly, because in adaptation to social needs, and in accordance with circumstances. And if they are wrongly decided, there is no superior civil authority that can correct them.

But in the case of all societies and bodies that are subordinate to the State, they are all *under law*, and the State may have authorities that can control even majorities, and hold them to the observance of law. It is weak if it has not. Without this, selfishness, and party spirit, and caprice, would rule in all such bodies, and would so often do injustice that all subordinate associations would be abandoned by the wise and prudent, and by the lovers of quiet and order. People join such associations for the sake of their benefits, and from faith that they will be conducted according to known principles, and not be mere whims of majorities. It is therefore of no sort of importance what may be the majority in such matters, it cannot weigh a feather in well-known law in affecting the rights of the minority. Before civil authority the question is, not which party has the majority, but which is right according to the law by which the body has hitherto consented to be governed.

Even States have to submit to an analogous rule in both their internal and external relations, but especially the latter. Not that there is any civil authority to control and judge them, but because surrounding States, and the world, and God, control and judge them. No degree of majority or unanimity can save them from such responsibility. To right, and duty, and good order, and respect for the right of others, even majorities must conform, or take the penalty; it is because they know this that the selfishness, and wrong, and disorder of majorities is not more prevalent than it is.

Those congregations which are united together in constituting a large denomination, besides feeling such a union to be a duty, think they are in some measure secured against the disturbances which active and ill-trained minds are apt to cause by raising parties and excitements in single congregations, and by seeking to carry out some fancy of their own by drumming up majorities, because the general law of the denomination acts as a check upon such proceedings.

No doubt this general law is not always well administered; perhaps it is sometimes found too rigid to yield to changes of circumstances, and to the growth of knowledge and customs; but this is no serious evil so long as people are perfectly free to abandon religious connections that have become distasteful to them. Any societies that are so rigid as really to fall behind the growing light of truth, will in time find the proof of it in their decreasing numbers and decaying influence. It certainly cannot be right for people to join them without believing in their system, or because of the attractive eloquence of their preacher, and then to make use of their position in order to force upon them a constitutional or doctrinal revolution.

But we need not enlarge upon this subject. What we have said in the case of McGinis *vs.* Watson, relative to the union of the seceders and Associate Reformed, argued at Pittsburg, last term, will give further information relative to our views on this kind of case.

We have no doubt that a majority of the congregational meeting transgressed their own law, and attempted to violate the rights of the minority, by calling a pastor whom their classis would not accept, and by resolving the secession from the Reformed Dutch Church. The majority may direct and control consistently with the particular and general laws of organism, but not in violation of them. This principle is decided in many cases: *Presbyterian Congregation vs. Johnson, 1 W. & S., 37; Den vs. Bolton, 7 Halst. (N.J.) 25; Miller vs. Gable, 10 Paige, 627; Attorney-General vs.*

Murdoch; 1 De Gex, M. & Gordon, 86; 12 Eng. Law and Eq. Rep., 83, 98. And, in this last case, Vice-Chancellor Knight Bruce says nothing less than a unanimous vote can do it, and this may, for then no right is violated.

There is nothing in the laws of this congregation, or of the Reformed Dutch Church, that authorizes the trustees to engage supplies for the pulpit during the vacancy of the pastorate; that duty belongs to the consistories.—Constitution, c. 2, art. 2.

. . . . . .

Decree.

Trustees of East Norway Lake Norwegian Evangelical Lutheran Church and others *vs.* Johannes Z. Halvorsen and others.

The Supreme Court of Minnesota,

February, 1890.

Reported in 42 Minn. Reports, 503.

Gilfillan, C. J.—From 1866 to 1877, there existed at or near Norway Lake, in what is now the county of Kandiyohi, in this State, an incorporated religious congregation called the "Norwegian Evangelical Lutheran Congregation." In 1877 the persons composing this congregation divided by consent into two congregations, each of which then became duly incorporated under the statute, one by the name of the "Trustees of the East Norway Lake Norwegian Evangelical Lutheran Church of Kandiyohi County, Minnesota," and the other by the name of the "Trustees of the West Norway Lake Evangelical Lutheran Church of Norway Lake, County of Kandiyohi, and State of Minnesota." These two corporations still continue, and they are the plaintiffs in this action. The two corporations acquired as tenants in common, apparently soon after their incorporation, certain real estate, including that in controversy. They appear to have employed one common pastor, and to have used the real estate in controversy as a parsonage. It does not appear that in the deed conveying the real estate to the two corporations there was expressed any trust or use for which the property was to be held.

About 1885 differences of opinion upon certain matters of doctrine had arisen and existed, and still exist, among the members of each of the two congregations. It appears that those holding one set of opinions on these matters of difference, in each of the congregations, were a considerable majority of the congregation. Such majority in each, claiming to be the congregation, held meetings from time to time, which they claimed to be legal meetings of the congregation, and which were so, unless they had ceased to be members of the congregations by reason of

the opinions they held upon the matters of doctrine referred to. From these meetings no member of the minority was excluded, though the meetings ignored the claim of the minority, as a body, to be the congregation. At these meetings, trustees for each congregation were elected from time to time, as vacancies occurred, thus keeping up a regular succession of trustees from the organization of the congregations, and other business was transacted, including the dismissal of the prior pastor, who held the opinions of the minority on the matters of difference, and the calling of another in his stead. The minority in each congregation also held meetings from time to time, which they, assuming that the majority had ceased to be members of the congregation by reason of holding opinions which the minority regarded to be heretical, claimed to be the meetings of the congregation; and at such meetings they transacted business, called a pastor, and from time to time they elected trustees. And so it came about that there were, and are now, for each congregation, two sets of trustees—the majority trustees, who are in continuation of the original organization, and the minority trustees; each set claiming to be the regular trustees of the corporation. The pastor called by the minorities was the defendant Halvorsen, who was put in possession of the real estate in question by the minority trustees. The majority trustees, having demanded of him the possession, and he having refused to surrender it, caused this action to be brought, in the name of the plaintiff corporations, to recover possession of it.

The minority trustees have intervened in the action, asking that it be dismissed; that they and their associates be adjudged to be the rightful congregations of East and West Norway Lake; and that the title to the offices of trustees, as between them and the majority trustees, be determined in their favor. They seek, indeed, to turn this, a simple action in ejectment, into a proceeding, in the nature of *quo warranto*, to test the title to a corporate office. This, of course, can not be done. If there was no

other reason why it can not, this would be conclusive—that the opposing claimants to the offices, the majority trustees, are not parties to the action.

But while the question of title to the office can not be directly or authoritatively determined, so as to oust the intruders and put the rightful claimants in possession, it may be necessary to pass upon it as incidental to another and a proper issue in the case. The defendant Halvorsen, in his answer, alleges that the minority trustees were the legal trustees of the corporations; that he was put in possession by them, and is in possession under their authority. If these allegations be true, he is in under and by authority of the plaintiffs, and that would be a defense. So that as part of that defense, and as between him and the plaintiffs, it is necessary to consider and determine whether the minority trustees were lawful officers of the corporations; and this will make it necessary to determine which of the two sets of meetings, those of the majority or those of the minority, were the lawful meetings of the congregations.

The defendant argues that as the minority trustees are *de facto* officers, and as they are in possession, any action to put the rightful trustees in possession, will not lie until in a proper proceeding, as by *quo warranto*, the right to the office is first determined. But, first, the minority trustees are not in possession of the land. If Halvorsen is rightfully in, his possession is that of the corporations. He is not, whether rightfully or wrongfully in, possessing the land as the tenant or agent of the persons who put him in. The minority trustees could not, in their own names, maintain an action to recover the premises from him. And, *secondly*, to determine that they are *de facto* trustees, it will be necessary to determine the point on which their claim to be legal trustees depends. To make one a *de facto* officer, it is not enough that he claims to be an officer, or that he assumes to act as such. He must be acting as an officer under color of having been rightfully elected or appointed. Now, unless it be true that the minorities con-

stituted the congregations, and that their meetings were meetings of the congregations, then there was no semblance of an election by the congregations, the bodies entitled to elect. Take the case of a congregation composed of 1,000 members, of whom forty or fifty should get together, assume to excommunicate the others, or declare them no longer members, and assert themselves to be the congregation, and proceed to elect officers. That would have no color of an election by the congregation of 1,000 members, nor by any body having a right to elect for that congregation. Such a case is more extreme than this, in that the difference in numbers between the original congregation and the seceders is greater, but the principle applicable to the cases is the same. In either case, the meeting of the minority, whatever they might claim for themselves, would not have the appearance of a meeting of the original body, and its acts would not appear to be the acts of such original body. To give to their acts the appearance of acts of the congregations, it was necessary that the persons meeting, the minorities, should be the then existing congregations; a thing which is not claimed, if the majorities were still members of the congregations. So that, to decide whether the minority trustees were either *de jure* or *de facto* officers of the corporations, we must determine whether in law the bodies which elected them were the congregations.

The defendant claims that the minorities were the lawful congregations, because, as he asserts, the majorities had departed from the true doctrines, adherence to which was, according to the constitution of the two (local) churches, the bond that was to hold the congregations together, and had adopted views of doctrine which, according to such constitutions, were heretical; and that they thereupon, *ipso facto*, ceased to be members of the congregations, and that that left the minorities, who adhered to the true doctrines, the only members of the congregations—the only bodies or persons who had any rights in the property held by the corporations for the use and

benefit of the legal congregations, or any rights in the government of the corporations.

Civil courts take up matters of religious doctrines with extreme reluctance. They never do so—it is beyond their province to do so—for the purpose of determining the abstract truth or falsity of any religious doctrine; and they never consider them at all except where civil rights, rights of property or contract respecting the holding, control, use, or enjoyment of property, are dependent on them. Thus where by contract the right to hold, control, use, or enjoy property depends upon an adherence to, or teaching of, a religious doctrine, the civil courts will examine that which, as a matter of fact, the doctrine is, and whether, as a matter of fact, this or that person adheres to or teaches it. But they will go no further than is necessary to determine the question of fact. The proposition that the courts will make such examination as of a matter of fact must be understood in connection with this other proposition, that where the contract provides, or by implication contemplates, that the question which is according to, and consistent with, the particular doctrine or doctrines, shall be determined by some church judicatory. No determination of such judicatory, duly made when the matter is properly brought before it, will be conclusive upon the civil courts. And this is so, not because the law recognizes any authority in such bodies to make any decision touching civil rights, but because the parties, by their contract, have made the right of property to depend on adherence to, or teaching of, the particular doctrines as they may be defined by such judicatory. In other words, they have made it the arbiter upon any questions that may arise as to what the doctrines are, and as to what is according to them.

Where a number of persons associate to form a religious congregation, to acquire property for its use, and incorporate for the more convenient holding and control of the property, the constitution or body of rules which they adopt to prescribe who shall be members of the cor-

poration, and entitled to a share in the control of it, is the contract by which they are bound. The right to a share in the government of a corporation is a civil right, which the law will protect, and the courts will therefore determine who are the members of the corporation. And where, as is usually the case with local church organizations, and as is the case here, all the adult male members of the religious body, the congregation, and no others, are members of the corporation, so that when one becomes a member of the religious body, he becomes a member of the corporation, and when he ceases to be a member of the religious body he ceases to be a member of the corporation, and has no further rights in it and in the property owned by it; the court, to determine on the civil right claimed—that to be a member of the corporation—must determine on membership in the religious body, the congregation. And it must determine this by the rules which the congregation has adopted for its membership. If the rules make adherence to particular doctrines a condition of membership, then, so long as those rules continue, the repudiation of such doctrines would seem to determine a member's right to remain in the congregation. Whether, when one has been admitted a member of a congregation, a civil court will consider the matter of his adherence to such doctrines, or will leave it to the proper religious tribunal—the congregation, if there be no other—is not in this case necessary to determine; for it is not shown that the majorities of the congregations ever departed from the doctrines, adherence to which was, by the rules adopted by the congregations, made a condition of membership. The controversy between the majorities and the minorities was upon the interpretation or understanding of certain dogmas set forth in what is known among Norwegian Lutherans as the "Book of Concord," which had been adopted by these congregations as one of the exponents of their religious faith and doctrines. Each party acknowledges the authority of that book and professes adherence to the doctrines taught by it. Each claims that

its is the right interpretation of those doctrines. Learned ministers and professors among the Norwegian Lutherans differ as to which is the true interpretation. There is no reason to doubt that each party insists upon its interpretation in good faith, and fully believing it to be consistent with the Book of Concord. Unless it has been done by action of the majorities since the differences arose, about 1885, these congregations have never prescribed adherence to either interpretation as a condition of membership. The constitutions of the congregations do not. These constitutions are designated "by-laws," divided into twenty-eight sections. By Section 3, the congregations acknowledge God's holy word, revealed in the canonical books of the Old and New Testaments, as the only rule of faith, doctrine, and life. By Section 4 they adopt the Evangelical Lutheran confession of faith, found in the Book of Concord, as a pure and unadulterated statement of the doctrine of God's holy word. The by-laws do not refer to nor adopt any particular interpretation of any doctrine stated in the Book of Concord, nor provide any means for determining differences that may arise as to the meaning of the statements of doctrine in it. Ordinarily, an independent religious society, which does not acknowledge any superior or other religious tribunal as having the right to authoritatively define for it matters of doctrine, must do so for itself. But these congregations, while not acknowledging it in any other body, seem to disclaim that power. Section 13 of the by-laws provides: "The congregation, in its entirety, has the supreme power in the external and internal management of all church and congregational affairs; but the congregation has not the power to ordain or direct anything contrary to the word of God and the symbolical books." And Section 19: "Questions of doctrine and conscience cannot be decided by vote, but only by the word of God, and the symbolical books." Section 25 seems to reserve the power to expel members "conformably to the word of God." Section 26 provides that in case of a division of the con-

gregations the property shall belong "to that portion which faithfully adheres to these by-laws, to the word of God, and to the symbolical books, according to the views now held by the Norwegian synod." It is urged on behalf of the defendant that under this by-law, as the minorities act here, and the majorities do not, to these things according to the views then held by the synod, the minorities are entitled to the property; that is, that, so far as affects rights of property, they are the congregations. But, as appears by its constitution (see Sec. 3, Chap. 1) in force when these congregations were organized and their by-laws adopted, the synod had as a rule of faith, in addition to the Old and New Testaments, only the Apostolic, Nicene, and Athanasian creeds, the unaltered Augsburg Confession, and Luther's Smaller Catechism. The Book of Concord is not placed among the symbols. So that the synod can not be said to have had any views upon the question of interpretation upon which these parties differ. The relation between the synod and the congregations (those congregations belonging to it) seems peculiar. The former body does not assume any authority to define doctrine for the congregations. By Sec. 6, Chap. 5 of its constitution, its meetings are declared to be merely advisory, so far as the congregations are concerned; and Sec. 4, Chap. 2 declares that "questions of doctrine and conscience cannot be determined by a plurality of votes, but only according to the word of God and the symbolical books of our church."

The synod, and the congregations sending delegates to it, are merely religious bodies, in the organization, control, and government of which, as such, the civil tribunals have nothing to do. It is for the synod to determine when and for what cause it will sever its connection with any congregation; and for the congregation, considered merely as a religious association; to determine when it will expel a member. Of course, and in the nature of things, it must be by vote, even though the cause assigned be matter of doctrine.

But to return to the constitution (by-laws) of these congregations. While adherence to the doctrines adopted by them may be considered as conditions of becoming or remaining a member, it is not so with any new matter of doctrine that may arise, or with any honest interpretation of the statements of former doctrines. We infer from the by-laws that such come within the disclaimer of Section 19, and belong, not to the congregations, but to the individual conscience of each member, so that it was not intended that any member should be responsible to the congregation for his views upon them. A civil court, therefore, could not determine that by adopting any particular opinion of such new doctrine or such interpretation, a member, *ipso facto*, ceases to be a member of the congregation, so as to lose his rights in the corporation.

Judgment affirmed.

Note.—A motion for a re-argument of this case was denied, April 1, 1890.

Garrelt Wehmer *et al.*, Appellees, *vs.* Wilm Jannsen Fokenga, *et al.*, Appellants.

The Supreme Court of Nebraska,

January, 1899.

Reported in 57 Nebraska Reports, 510.

Ragan, C. J.—The Evangelical Lutheran Church in the United States is a descendant of the Lutheran Church of the sixteenth century—the first church of the Reformation. It takes its name of Lutheran from the great founder and apostle of Protestantism, and seems to have been called "Evangelical" to distinguish it from the Reformed or Calvinistic Lutherans. In the United States there are several families of this Lutheran Church—the Dutch Lutherans, the Swedish Lutherans, and the German Lutherans. The organic and fundamental creed of these various branches of the Lutheran Church is the Augsburg Confession. The German Evangelical Lutheran churches in the United States are not all subject to one supreme jurisdiction; that is, no body, council, or conference of German Lutherans is invested with the management and general supervision of all the German Evangelical Lutheran congregations in the United States. The congregations in any particular district or State, such as the congregations in the State of Nebraska, hold annually a synod for such district or State. This synod is constituted of ordained ministers and licentiates of the various German Evangelical Lutheran congregations in the district. Just what the jurisdiction of this district synod is does not appear from the record before us, but it seems to be invested with the general supervision and control of the congregations within its district and with authority to determine disputes arising in the various congregations over matters of church discipline and ecclesiastical questions. There are also held at stated times in the United States certain synods. These synods are composed of delegates chosen from the district or State synods; and while the jurisdiction of this last synod does not clearly appear, it seems to be in the nature of an

ecclesiastical court of last resort for the various congregations over which it has jurisdiction. There are in the United States several of these synods, which we call national to distinguish them from the district or State synods already referred to. For instance, there are, among others, the Missouri, the Iowa, and the general synods. Certain German Evangelical Lutheran congregations attach themselves to and acknowledge the jurisdiction of the Iowa synod, make their contributions for missionary purposes through that synod, and accept from that synod their pastors or ministers. Certain other German Evangelical Lutheran congregations subject themselves in like manner to the jurisdiction of the Missouri synod, and certain others of such congregations subject themselves to the jurisdiction of the general synod. But the organic and fundamental creed of all these German Evangelical Lutheran congregations is the Augsburg Confession, no matter whether the congregations acknowledge the jurisdiction of the Iowa or the general synod. The congregations of German Evangelical Lutheran churches subject to the Iowa synod, and the congregation subject to the general synod, differ in some matters of faith; for instance, the congregations in the Iowa synod practice what is called " close communion "—that is, the congregation does not permit members of other Christian churches to commune with them, while the congregations subject to the general synod admit all Christians to their communion table. The congregations of the Iowa synod believe in the doctrine of Chiliasm, or that Christ will visibly reign upon the earth for a thousand years, while the congregations of the general synod reject this doctrine. In the matters of church discipline and government, the congregations of the Iowa synod will not allow a minister belonging to another synod to officiate, while the congregations acknowledging the jurisdiction of the general synod permit ministers of any synod to act as their pastors. The congregations of the Iowa synod do not permit their members to belong to secret societies, while the

congregations of the general synod do not control their members in that respect. . . .

In February, 1883, there resided in a neighborhood in Johnson County, in this State, a number of Germans professing the Lutheran faith, and at that time there came among these people a preacher or evangelist by the name of Grommish, who was a minister of the General Synod of the Evangelical Lutheran Church in the United States, and acknowledged the jurisdiction of such synod. This evangelist called together at the residence of one of them a number of these German people, preached them a sermon, and advised them to organize a congregation. A number of these Germans drew up a writing of that date, in which they organized themselves into a religious corporation under the laws of this State, to which they gave the name of " The Evangelical Lutheran St. John's Church of West Sterling, Sterling, Johnson County, Nebraska." This writing or article of association was duly filed in the office of the county clerk of said Johnson County. The congregation elected trustees and called the Rev. Julius Wolf, a minister of the general synod, and made him its pastor. The congregation seems to have flourished for a number of years. It increased its membership. It purchased a small tract of land, and erected thereon a building for church and school purposes, and made contributions to the missionary cause through the general synod. About 1894, the Rev. Wolf, by reason of ill-health and old age, tendered his resignation to this congregation as its pastor, and it was accepted. Thereupon a portion—a majority, it seems—of the congregation desired to select a minister from the Iowa synod. Another portion of the congregation—a minority, it seems—insisted that the pastor should come from the general synod, and over this question the congregation was riven into two factions. The theory of the minority was that the church, as originally founded, was organized and made subject to the jurisdiction of the general synod; that the property owned by the congregation had been donated to it to further not

only the general, fundamental, organic, doctrine of the Lutheran Church, but the peculiar faiths, and beliefs, and matters of church polity entertained by congregations belonging to the general synod, and that a majority of the congregation was powerless to transfer this congregation from the jurisdiction of the general synod to another, and was without jurisdiction or authority to select its minister from any jurisdiction except that of the general synod. The theory of the majority of the congregation was that the church, as originally organized and founded, was a free church; that it had and always had had, authority to select its minister from any synod whose congregations were orthodox Lutherans; that so long as the church property was used to further the teachings and dissemination of the organic and fundamental creed of the Lutheran Church, it was not being diverted from the purposes for which it was donated; and that the congregation, or a majority of it, might select any minister from any of the various synods of the Evangelical Lutheran Church in the United States. The minority party of this congregation, in October, 1894, held a meeting and adopted what is called a constitution of the church, in and by which it annexed, or attempted to formally annex, the congregation to and subject it to the jurisdiction of the general synod. The majority party of the congregation also held a meeting, at which it adopted what is called a constitution for the congregation, declared the church to be a free church, and that the majority of the congregation had the right to select its minister from any synod it chose of the various synods of the Evangelical Lutheran Church. Each of these factions, it seems, elected certain persons whom it styled the trustees of the congregation. While things were in this condition Garrelt Wehmer and others, in behalf of themselves and the minority of the general synod faction of the church, brought this suit in equity in the district court of Johnson County against Wilm Jannsen Fokenga and others, representing the majority faction of this congregation.

Among other things, Wehmer and others alleged that the congregation was originally organized and was still subject to the jurisdiction of the general synod; that the parties made defendants and those in sympathy with them were seeking to transfer the jurisdiction of the congregation to the Iowa synod; that they were threatening and were about to select as pastor a minister of the Iowa synod; that the parties made defendants had taken forcible possession of the church and church property and had excluded, were excluding, and would continue to exclude Wehmer and others, or the minority faction, therefrom. On the hearing of this case the district court found generally and specially in favor of Wehmer and others; found that the church as originally organized was, and was still, subject to the jurisdiction of the general synod; that Wehmer and others were the legal trustees of the congregation and of the church, entitled to the possession, custody, and control of the property; that the Iowa Synod of the Lutheran Church differed from the general synod of that church in essential matters of government, faith, and belief; that all the acts of the parties defendant hereinbefore stated were illegal; that the majority faction had conspired together to transfer the jurisdiction of the congregation from the general to the Iowa synod; that the majority faction had called in ministers from the Iowa synod to conduct services in the church, contrary to the organic law thereof, and had forcibly excluded the minority faction therefrom; and thereupon the court entered a decree restraining the majority faction from keeping the minority faction out of possession of church property and from selecting a minister for said church from the Iowa synod. From this decree Wilm Jannsen Fokenga and others have appealed.

1. We assume, without deciding, that all the findings made by the district court are supported by the evidence, and still we think this decree can not be sustained. The court found that the doctrine and tenets of faith and church polity of the Iowa synod were essentially different

from those of the general synod, and on this finding enjoined the majority faction of the congregation from selecting for pastor a minister of the Iowa synod. Whether the religious teachings, faith, and church polity of these synods differed in essential particulars was and is a question for the ecclesiastical tribunals, not for the civil courts. It is neither pleaded nor proved that an ecclesiastical tribunal having final jurisdiction to decide this question has determined it in favor of the contention of the appellees; nor is it shown that no such an ecclesiastical tribunal exists having jurisdiction to decide the question. Until such a tribunal—if one exists—shall decide the question, the civil courts will not assume to do so. When some ecclesiastical tribunal having jurisdiction in the premises shall determine that according to the organic law of the church this congregation may or may not subject itself to the jurisdiction of the Iowa synod, and select for its pastor a minister of that synod, then the civil courts will recognize this judgment, and, if called upon, enforce. But it would be an unseemly thing for the secular courts to assume to themselves the right to decide in the first instance whether a certain doctrine or tenet of faith possessed and practiced by one religious organization was contrary to the organic and fundamental doctrines and creed of another religious organization. It may be that because the ministers of the Iowa synod believe in Chiliasm, therefore this congregation would violate the fundamental and organic law of its creation by selecting a minister from the Iowa synod for its pastor; but we think that is a question which the civil courts should not attempt to decide. Suppose a Presbyterian congregation, being without a minister, should by a major vote of all the members of a congregation select for its pastor a Methodist minister. Can it be that the civil courts would enjoin the major part of that Presbyterian congregation at the suit of the minor part of it, upon the ground that such action on the part of the majority would violate the organic law of the Presby-

terian Church? We think not. The remedy of the majority in that case would be the same as it is here—to appeal to the ecclesiastical tribunals of the Presbyterian Church to first determine the question, and if it prevented a judgment in its favor, then, if unable to enforce it otherwise, call upon the secular courts for protection.

2. But the district court found that the trustees representing the appellees here were the lawful trustees of the congregation, and as such were entitled to the possession of the church property, and that the appellants were forcibly and wrongfully excluding the appellees therefrom. Assuming all this to be so, it does not follow that the appellees were entitled to the extraordinary remedy of injunction, either to regain possession of this church edifice or to exclude the appellants therefrom. For this relief the appellees had a complete and adequate remedy at law, either by an action in the nature of forcible entry and detainer, or by ejectment; and it is neither pleaded nor proved but that either of these remedies would afford the appellees complete and adequate relief. *Martin vs. Williams, 53 Neb., 143.*

3. Counsel for the appellees brought this case upon the theory—and the district court seems to have adopted it—that the real estate which belonged to this congregation was donated to it for the purpose of teaching and disseminating, not only the cardinal doctrines of the Lutheran Church, the organic creed—to wit, the Augsburg Confession—but the peculiar tenets of faith, already noticed, held by the congregations of the general synod; and that for this congregation to transfer its allegiance to and become subject to the jurisdiction of the Iowa synod would divert the trust property from the purpose for which it was donated. We do not think it necessarily follows that if this congregation should transfer its allegiance to the Iowa synod this would be a diversion of the church property from the purposes for which it was donated to the congregation. The deed conveying this property to the congregation or trustees thereof does not

recite that it was conveyed to the congregation or the trustees as trust property to be devoted to the teaching and dissemination of the cardinal doctrine of the Lutheran Church, much less the peculiar tenets of faith entertained by the congregations of the general or any other synod. Furthermore, no faction of this congregation has threatened or attempted to sell, dispose of, or encumber the church property. The question then as to the power of the majority of this congregation to make a valid sale and conveyance of the congregation's real estate is not presented by this record; and if it was, there is respectable authority for the proposition that the majority of this congregation may sell and dispose of this church property, since its title is not encumbered with an express trust. *Wilson vs. Livingston, 58 N. W. Rep. [Mich.], 640; Schradi vs. Dornfeld, 55 N. W. Rep. [Minn.], 49.* The parties to the suit, if they can not settle their differences otherwise, must appeal to the ecclesiastical tribunals of their church and have those tribunals determine the rights of these factions according to the organic laws of the church; and when this has been done the civil courts will cheerfully take the judgment of the ecclesiastical tribunal as final in the premises, and protect the rights of the congregation, as declared by such judgment. *Watson vs. Jones, 13 Wall. [U. S.], 679; Paunder vs. Ashe, 44 Neb., 672.* But the courts of the State are but the humble instruments for interpreting human laws which contain no heresy, and are committed to the support of no dogma. Religious liberty and religious toleration would not long survive if one member of a religious organization, feeling himself aggrieved in some matter of religious faith or church polity, could successfully appeal to the secular courts for redress, and have these courts determine that one faction of a religious organization was orthodox, and living and acting in conformity with the organic creed of the church, and another faction was violating and disregarding such organic law. The decree of the district court must be, and is reversed, and the action dismissed.

Reversed and dismissed.

Robertson and others against Bullions and others.
Decided in the Court of Appeals, New York, June, 1854.
Reported in 11 New York Reports, 243.

In 1785 a religious society was formed in the town of Cambridge, Washington County, under the name of the Associate Congregation of Cambridge. This society, upon its organization, connected itself with and became subordinate to the Presbytery of Pennsylvania. In July, 1786, Jonathan French, by deed expressing a consideration, conveyed one-half acre of land to John Blair and six others, describing them as persons "chosen and elected trustees for the Associate Congregation of Cambridge, adhering to the Associate Presbytery of Pennsylvania," *Habendum*, to them "and their successors forever, for the sole and only proper use, benefit, and behoof of the said Associate Congregation of Cambridge." This deed was not signed by the wife of French. In 1802, the Presbytery of Pennsylvania was divided into several presbyteries, this congregation being in the presbytery of Cambridge, and a synod was established as the head of the church, styled the Associate Synod of North America. In January, 1810, French and wife, by the consent of the grantees of the first deed, executed another deed of the same half acre, to James Small, James Eddy, and James Irwin, three of the grantees in the former deed, and eleven others, describing them as trustees of the said Associate Congregation: *Habendum*, to them, "their heirs and assigns forever, to the intent, for the use and in trust for the members who then were, or thereafter might be, *in full communion with*, and should comprise the Associate Congregation of Cambridge, in accession to the principles then presently maintained by the Associate Synod of North America, and then under the inspection of the Associate Presbytery of Cambridge, belonging to said synod, and for such persons as the said members at any time thereafter might elect and choose from among themselves as trustees, and their successors in office, to be elected and chosen as aforesaid." Upon this half acre of

land the church edifice was built in 1833, by subscription, at a cost of about $9,000.

In 1826 the society was incorporated under the general act by the name of the "Associate Congregation of Cambridge of the County of Washington and State of New York," "adhering to the principles of the Associate Presbytery of Pennsylvania formerly, now the Associate Synod of North America." The society, both before and after its incorporation, acquired other parcels of land, which were conveyed in fee to the trustees by deeds expressing a consideration, and containing no conditions or limitations, nor any specification of the uses to which they should be applied. It also procured a library; its whole property, real and personal, being estimated at about $13,000.

In 1808, this congregation, with the assent of the presbytery, called the defendant Bullions, who was duly ordained by the presbytery, as its minister, and he continued to officiate as such without censure, until 1838, when, for certain alleged misconduct, he was deposed by the presbytery and excommunicated, with the lesser sentence of excommunication. He appealed to the synod, but his deposition and excommunication were confirmed. Notwithstanding this action of the ecclesiastical judicatories, a large majority of the congregation, including a majority of the trustees, adhered to Dr. Bullions, and continued him as their pastor, devoting the revenues of the congregation to his support. The trustees also refused to permit two clergymen sent by the synod to occupy the church edifice, and closed its doors against them. The minority of the congregation, who sustained the action of the synod, organized separately, and elected separate trustees.

In 1839, the complainants, being a portion of this minority, in behalf of themselves and those who concurred with them, filed their bill setting forth the foregoing facts, and praying that the trustees be compelled to permit clergymen in good standing in the associate church to preach in

their church edifice, and to appropriate the corporate property to support such preaching; and that the defendants be decreed to account for the property since the deposition of the defendant Bullions, and that the trustees be removed from office, and deliver up the property, etc. The cause was brought to a hearing upon pleadings and proofs before the Vice-Chancellor of the fourth circuit, who made a decree granting the relief prayed for, removing the trustees, and requiring them to account. The respondents appealed to the Chancellor, and their appeal was heard at a general term of the Supreme Court, and a decree made reversing the decree of the Vice-Chancellor and declaring the defendants to be the lawful trustees and as such entitled to the property; but declaring also, that the defendant Bullions had been deposed, and that the trustees could not rightfully devote the revenues of the corporation to his support, and prohibiting his employment thereafter, until he should be restored to the office of the ministry. From so much of this decree of the Supreme Court as was against them the complainants appealed to this court. The respondents acquiesced in the whole decree.

Selden, J.—The defendants not having appealed from any portion of the decree of the Supreme Court, so much of that decree as declares that Dr. Bullions had been deposed from the ministry, and that the trustees could not rightfully appropriate the funds of the corporation to his support, while he continued so deposed, without the consent of all the members of the corporation, and as prohibits such appropriation for the future, is to be regarded as final and conclusive. This court can only review those parts of the decree from which an appeal is taken. *Kelsey vs. Western, 2 Corns., 500.* It is not, however, to be inferred from this portion of the decree, that the Supreme Court intended to affirm the views of the trust insisted upon by the complainants; because that part of the decree of the Vice-Chancellor which declares the nature of the trust, was expressly reversed and annulled by the Supreme

Court. The whole case, therefore, except so far as it is involved in the simple prohibition in regard to the support of Dr. Bullions, is before this court; and in determining the questions which must necessarily be here decided in respect to the removal of the trustees, and their obligation to account, it becomes indispensable to pass to some extent upon the powers, duties, and functions of trustees of religious corporations, the tenure by which they hold the corporate property, and the nature of the trusts committed to their charge.

Two distinct views have been taken of the nature of the corporations formed pursuant to the statute of this State providing for the incorporation of religious societies. According to one of these views the society itself does not become incorporated, but only its trustees. The individuals composing the society, the persons associated for the purpose of religious worship, form no part of the corporation, and are not to be regarded in any sense as corporators, but simply members, as well after as before incorporation, of a voluntary association, without unity, except such as may be produced by the assent of its members, of its own self-imposed rules and regulations. The trustees, in this respect, constitute a body corporate entirely separate and distinct from the society, created for the sole purpose of receiving and holding the legal title to the property, and devoting it to the purposes and objects of the society, which is supposed to retain its distinctive characteristics as a mere voluntary association, in no degree merged in the corporation, even in respect to its temporal and secular concerns. The consequence of this view of the subject would be, that the trustees of a religious corporation are not to be regarded as the managing officers and agents of the society, clothed with the aggregate powers of the corporators, representing their interests and intrusted with a discretionary charge of their temporal affairs, as in other corporations, but their relations to the society are those simply of a trustees to his *cestui que trust*, as understood in equity. Were this view

established, its effect would probably be to devolve upon the courts of equity the administration of the entire property of religious corporations throughout the State, a jurisdiction bringing with it as its inevitable concomitant, innumerable judicial inquiries into modes of faith, shades of religious opinion, and all those subtleties which attend the diversities of religious belief.

The other view assumes that the society itself is incorporated; that the previous voluntary association is merged in the corporation, so far as its secular affairs merely are concerned; that the trustees are not the body corporate itself, but merely its officers, to whom is committed the custody of its property, and the management of its concerns; that the members of the association form the constituent body, the legal entity of which is represented by the trustees, and that the latter are clothed with the customary discretionary powers which appertain to the managing officers of all civil corporations; modified, it is true, in some degree, by the mixed nature of the body which they represent, and the peculiar objects of the incorporation.

The argument by which the former of these views is sustained rests mainly upon that clause in the third section of the act authorizing the incorporation, which, after providing for the election of these trustees, declares, not that the society, but that such trustees and their successors, shall, by virtue of the act, be a body corporate, by the name or title expressed in the certificate. But while I do not deny the force of this and the other arguments adduced in support of this construction of the act, I nevertheless insist that the arguments against it are too strong to be resisted. In the first place, such a construction is adverse to the universal popular sentiment in respect to the law in question. To prove this I need only refer to the names adopted by the various religious societies upon becoming incorporated. The following list was taken promiscuously from the records of religious corporations in Monroe County, viz: Churchville Presbyterian *Society,*

First Congregational *Society* of Mumford, Associate Reformed *Association* of Beulah, Adam's Basin Free Church *Society*, Baptist Church and *Society* of Sweden, Society of *Christian Brethren* in Rochester, St. Peter's Presbyterian *Congregation*, Rochester; Fifth Presbyterian *Society and Congregation* of Rochester.

Of the great number of religious corporations in the county, almost all bear names similar in character to these. The trustees are sometimes, though rarely, named.

The founders of these corporations must have supposed that it was the society or congregation that was incorporated. I hazard nothing in saying that this has been the general understanding throughout the State, ever since the passage of the acts in question.

But this view of the nature of religious corporations is not only opposed to the general sentiment of the people, but is repugnant also to judicial construction, so far as any has ever been given to the acts in question. In the case of *The Baptist Church, etc., vs. Witherell (3 Paige, 296)*, Chancellor Walworth treats, throughout, the society or congregation as the corporate body, the members of the society as corporators, and the trustees as the mere officers of the corporation. He says: " At the time the deed of Norton and wife was executed conveying the property to this society by their associate name, the statute was in existence by which the members of the society were authorized to *incorporate themselves* whenever they thought proper." Again, he says: "My opinion, therefore, upon the facts now before me is, that the corporation organized on the 6th of September, *succeeded to* the temporal rights of this society; and that the *trustees of that incorporation* are legally entitled to the possession and control of the meeting-house and other temporalities of the congregation." And again, " The fact that the *corporators*, whom the complainants (the trustees) *represent*, own two-thirds of the pews, can not alter the rights of the parties." The same view is taken in the subsequent case of *Lawyer vs. Cipperly (7 Paige, 281)*. So in the case of *Miller vs. Gable*, in the

late Court of Errors *(2 Denio, 492)*, Gardiner, president of the court, speaks of trustees as "representatives" of the congregation, and of the members of the latter as *corporators*. It is clear, therefore, that if the popular understanding of the act authorizing religious corporations be in error, it is one in which the most enlightened of our courts and judges have participated.

The view of the Act we are combatting is contrary to the general scope and language of the Act itself. It stands opposed in the first place to its title, which is "An Act to provide for the incorporation of religious *societies*." It is irreconcilable to Section 9 of the Act, which provides "That whenever any religious corporation within the State, other than the chartered corporations, shall deem it necessary, and for the interest of such religious corporations to reduce *their* number of trustees, it shall and may be lawful for any such religious corporation to reduce *their* number of trustees at any *annual meeting*." The trustees have no annual meeting; but this section authorizes the *corporation* to reduce the number of *their trustees*, at an annual meeting. This admits of but one construction. Again, this view is directly repugnant to the 14th section of the Act, which provides "that the *corporation* of the Methodist Episcopal Church in the City of New York, shall be and hereby are authorized to continue to elect nine trustees of the said corporation." Here the congregation in whom the right of election rests is styled the corporation in the Act itself.

It can not, I think, be necessary to pursue this subject further, although there are other portions of the statute which equally conflict with the view that the trustees, and not the society, constitute the body corporate. I think it is clear, therefore, that the views which appear to have been generally entertained by both courts and people upon this subject are correct; that the societies are themselves incorporated; that their members are the corporators, and the trustees the managing officers of the corporation.

What then are the powers, rights, and obligations of

this class of corporate officers, and to what extent has this court jurisdiction over them? These questions are to be answered, in view of the statute authorizing the incorporation of these societies and the rules which regulate other corporations of the same legal character, and their officers; and not with reference to those peculiar principles which are applied to trusts by courts of equity. These officers are trustees in the same sense with the president and directors of a bank, or of a railroad company. They are the officers of the corporation to whom is delegated the power of managing its concerns for the common benefit of themselves and all other corporators, and over whom the body corporate retains control, through its power to supersede them at every recurring election.

This is the plain inference to be drawn from the statute itself. Section 4 provides, among other things, not only that the trustees may take into their possession and custody all the property, real and personal, of the corporation, and may purchase and hold additional property, and devise, lease, and improve the same for the use of the society, and repair, alter, and erect church edifices, schoolhouses, and other buildings; but also that they may "make rules and orders for managing the temporal affairs of such church, congregation, or society, and dispose of all moneys belonging thereto, and regulate and order the renting of the pews in their churches and meetinghouses, etc., and *all other matters* relating to the temporal concerns and revenues of such church, congregation, or society." These are broad and sweeping powers, and the reason for their amplitude is to be found in the policy of the Legislature, which aimed to produce an entire separation between the spiritual and temporal concerns of these associations, and to prevent the latter from being in any manner brought under the control and management of the ecclesiastical judicatories. It was not designed to interfere in the slightest degree with the proper functions of these judicatories, but simply to limit them to their appropriate sphere. The provision giving to every mem-

ber of the congregation the privilege of voting, and the entire omission of any requirement in respect to the religious views or opinions of the persons to be elected as trustees, afford unmistakable evidence that no very rigid adherence to any particular creed or doctrine was contemplated, so far as concerned the management of the temporal affairs of the society; but that it was intended to leave all this to be regulated and controlled by the members of the corporation through the exercise of their legitimate corporate powers.

It follows from this view, that the Supreme Court are entirely right in holding, in this case, that these incorporated societies are not to be regarded as ecclesiastical corporations, in the sense of the English law, which were composed entirely of ecclesiastical persons, and subject to the ecclesiastical judicatories; but as belonging to the class of civil corporations to be controlled and managed according to the principles of the common law, as administered by the ordinary tribunals of justice.

The question then arises, to what extent had the late Court of Chancery jurisdiction and control of the officers of civil corporations, in respect to the performance of their official duties? This question was ably discussed by Chancellor Kent, in *Attorney-General vs. Utica Insurance Company (2 John., Ch. 371).* He there held that the Court of Chancery did not possess any general supervisory control over corporations of this character, and inclined to the opinion that the court had no jurisdiction whatever, even in a case of abuse by a corporate trustee, or other officer, of his trust, by a perversion or misapplication of the funds of the corporation.

But if it be admitted that a court of equity has power, by virtue of its general jurisdiction, over every species of trust, to interfere at the instance of a corporator, in cases of gross violation of duty by the managing officers of a civil corporation, which is at least doubtful; the question still remains, *how* may this jurisdiction be exercised? Does it extend to the removal of the officers of the corpora-

tion? It is difficult to conceive from what source the court, independent of legislative enactment, could derive such power. This class of officers receive their authority directly from the sovereignty of the State. The statute prescribes their qualifications, the mode of their election, and the tenure of their offices. What power has the Court of Chancery, or any other court, to set aside the statute; to impose conditions to the holding of the office which the statute does not impose? There is a wide difference between this description of officers and mere private trustees, whose powers rest solely upon individual contract. There, if the conditions of the contract be violated, the office is rightfully forfeited; and the court may enforce this forfeiture at the instance of the party aggrieved. But the powers of corporate officers have a source above that of mere private contract, over which the Court of Chancery has no paramount authority. No such power was ever asserted or claimed by the English Court of Chancery. On the contrary, when the question arose in the case of the *Attorney-General vs. The Earl of Clarendon (17 Vesey, 491)*, the power was peremptorily denied. "This court," said the Master of the Rolls, "I apprehend, has no jurisdiction, with regard either to the election or amotion of corporators of any description." There is a class of English cases, of a different character, which have been sometimes referred to in discussions on this subject, but which affords no support to the doctrine contended for here. They are cases where a *corporation* is made a trustee, having no beneficial interest in the fund. There, if the corporation grossly abuses the trust, it will be removed by the Court of Chancery, in the same manner as an individual trustee. Such was the case of *Ex parte Greenhouse (1 Madd., 92)*. This is merely the exercise of the ordinary jurisdiction of the court, and is widely different from the removal of corporate officers for a violation of their duty to the corporation.

The power here denied has been admitted by one or two of our judicial officers *(see Lawyer vs. Cipperly, 7 Paige,*

281; Bowden vs. McLeod, 1 Edw. Ch. R., 588;) and was exercised by the assistant Vice-Chancellor of the city of New York, in the case of *Kiskern vs. The Lutheran Churches (1 Sandf., Ch. R., 439).* The Vice-Chancellor went so far in his opinion in that case, as to authorize a decree, not only removing the trustees, but disfranchising a portion of the corporators, and prescribing who should be permitted to vote at the new election, to be held under the supervision of a master of the court; thus entirely superseding the statutory provisions prescribing the qualifications of electors. But the eminent counsel for the complainant, in preparing the decree, seems to have omitted entirely to avail himself of the privilege of disfranchisement thus conceded to him; an omission which is somewhat significant of his own opinion upon that point. This case is, in my judgment, in conflict with principle, and wholly unsustained by authority, in so far, at least, as it asserts the original power of the Court of Chancery to remove the trustees of a corporation regularly elected, in pursuance of the provisions of the statute, and to substitute upon a new election qualifications for electors defined by itself, instead of those prescribed by the statutes.

But in addition to the absence of all authority in favor of such a power at common law, the express provision of our statute, conferring the power upon the Court of Chancery in regard to corporations in general, and excepting religious, and one or two other classes of corporations, affords affirmative evidence, that, independent of the statute, the power did not exist. *(2 R. S., 462, Sec. 33, and 466, Sec. 57.)* The Supreme Court, therefore, were clearly right in denying the existence of this power.

This brings us to the consideration of the alleged trust in the present case. In the view I take of the case, it is unnecessary to inquire as to the effect of the deed of July, 1786, or whether a court of equity would sustain the right of the congregation to an equitable fee under that deed, agreeably to the obvious intent of the parties, or compel a further assurance to effectuate that intent;

but I shall consider the case as though all the rights, either legal or equitable, of the congregation or its trustees, derived under the first deed, were fully merged in the second. Under this deed the persons named became seized of an estate in fee, which they held subject to the trust expressed in the deed, until the congregation became incorporated in 1826. What then was the effect of that incorporation upon the title to this property, and upon the trusts under which it was held? We are saved the necessity of inquiring whether the title actually passed to the corporation; because, the counsel on both sides concedes that such was the effect of incorporating the congregation.

A question arises as to the construction of the clause in the deed limiting the trust. If by members "in full communion," etc., is intended members of the church, or the body of covenanted professors of a certain faith, as distinct from other members of the association, which I suppose to be its true interpretation, then prior to the incorporation the title to the property was held, not for the benefit of the congregation at large, but for the exclusive use and benefit of the members of the church of a particular connection.

What effect then had the transfer of the title to the corporation upon this trust? This involves the inquiry, whether trustees of a religious corporation can take a trust for the exclusive benefit of a *portion* of the body, whose interests they represent, and whose officers they are. In the case of *Williams vs. Williams*, decided by this court in January last, it was held that the trustees of such corporation might take a bequest in trust for the support of a minister, that being one of the *general* objects for which the corporation existed. Denio, J., in that case says: "The object of this bequest is the support of a minister, which is one of the most prominent of the objects for which these corporations are created. It is not essential to the validity of a bequest to a religious corporation that it should be given generally, for all the purposes for

which it may be used, or for *any* to which the trustees may see fit to devote it. This is apparent from the language of the provision as well as from the reason of the case. These corporations are authorized to take property, for the use of the society, ' or other pious uses,' which plainly shows that a benefactor may apply his bounty to the whole, or any one or more of the various purposes for which the corporation are authorized to hold property "-- (MS. opinion). The learned judge in this passage nowhere intimates that the trustees of an entire corporation can take and hold property for the sole benefit of a portion of the members of that corporation, and exclude the other members from all participation in its use. His language, in my view, tends strongly to repel any such conclusion. He says they are authorized to take property for the use of the *society*, and that they may take it for any of the objects for which the *corporation*, that is, of course, the corporation as an entirety, was created. It would be difficult, I think, to maintain that it would be compatible with the office and duties of trustees of a religious corporation, that they should take, and hold, and administer the revenues of property, from the benefits of which a portion of the corporators must be excluded. It would prove an entering wedge of division, the force of which even Christian charity and forbearance would scarcely be able to resist. But the unanswerable objection to such a trust is, that it is not authorized by the statute, and is inconsistent with its general scope and object, as well as with its terms.

It follows from this, that when the title to the property in question passed, as it is conceded it did, to the trustees of the corporation, by the voluntary act of all the parties interested either as trustees or beneficiaries, the trust, if its character was such as we have supposed, was merged, or was at least transmuted into a trust, for the benefit of the entire corporation. No question arises here in regard to the effect of this change, as between the trustees and the original grantor or his heirs. The exclusive trust in

favor of members of the church of a particular faith, if such a trust existed, being thus at an end, the title stands as though it had been conveyed to the trustees for the use and benefit of the corporation generally.

But it is said that the nature of the trust may be ascertained, not only from the language of the deeds by which the property is conveyed, *but may be inferred from the tenets, faith and practice of the creators of the fund;* and hence that it is to be inferred in this case that a trust was intended in favor of those only who adhered to the principles and practices of the Associate Synod of North America. This doctrine, if it means anything more than that where the language of the deed is ambiguous it may be explained by proofs of the surrounding circumstances, I deny. It is at variance with well-established principles, and rests, as I conceive, upon no sound and reliable common law authority. In the first place, conditions and limitations are not to be raised by inference or argument. *(See 4 Kent's Com., 132.)* The law favors the free and untrammeled alienation of property, simplicity in its title, and freedom in its use, especially in this country, and every presumption is against the existence of limitations, restrictions, or qualifications.

But the English cases upon which this doctrine of implied restriction is supposed to rest do not support it. The leading cases, and those usually relied upon to sustain it are, *Attorney-General vs. Pearson (3 Meriv., 353),* and those relating to the Lady Hewley charities, viz., *Attorney-General vs. Shaw (7 Sim., 309),* and same case in the House of Lords *(9 Clark & Fin., 355).* The doctrine of these cases has been so perverted and misapplied that I find it necessary to give to them a somewhat extended examination. They seem to me not to have been fully analyzed when referred to in the cases which have been made to rest upon their authority.

In *Attorney-General vs. Pearson,* a meeting-house and lot, belonging to a congregation of Protestant dissenters in Wolverhampton, was held by trustees; the trust being

expressed in the deed to be "for the worship and service of God." The deed also contained this clause, viz.: "That if at any time thereafter meetings for the worship and service of God should be *prohibited by law*, and thereby the meeting-house should become useless, it should be lawful for the trustees for the time being to sell and dispose of the same," etc. The deed bore date in 1701. The contest was between a majority of the trustees who were Unitarians, and a minority of one who was a Trinitarian, for the possession of the trust property and the administration of the trust. The main question involved in the case was, whether the property thus held could be devoted, consistently with the trust, to the support of a Unitarian minister and the worship of a Unitarian congregation. It was alleged in both bill and answer, that the trust was created for the benefit of a congregation of *dissenters;* so that no question arose on that subject. The Chancellor held that the trust could only be administered for the benefit of a congregation, and the support of a minister professing Trinitarian doctrines. The reason is important, and the key to the whole case. It was, that worship by Unitarians and the preaching of Unitarian doctrines at the time the trust was created were prohibited by law; were indeed a crime, both by the common law and under the statute of 9 and 10 Will., 3, Chap. 32; and it was not to be presumed that any person intended to establish a trust and a worship which was illegal and criminal. That this was the true reason upon which the decision was based may be proved beyond doubt or cavil from the case itself. First, from the arguments of counsel, who rested the case almost entirely upon this ground. Sir Samuel Romilly, in arguing for the complainants, said: "In 1701 land was settled and a meeting-house built *for the service and worship of God*, and there can be no question in a court of justice that by that expression is meant the worship and service of God according to the Trinitarian doctrine, *because* the opposite doctrine, with respect to the nature and character of the Supreme Being, had at that time no

legal existence, being expressly excepted out of the toleration act." The whole argument upon that side was of the same tenor.

Again, this ground for the decision is plainly to be collected from the language of the Chancellor himself; especially from that part of his opinion in which he asserts that if the nature of the trust were to be determined upon the language of the deed alone, independent of the averments and the admissions in the bill and answer, it would be the duty of the court to execute it in favor of the *established church.* After adverting to the allegations in the pleadings as sufficient to show that the trust was created for the benefit of a congregation of dissenters, he proceeds as follows: "I observe upon this, particularly, because I take it that if land or money were given for the purpose of building a church or a house, or otherwise for the maintaining and propagating *the worship of God,* and if there was nothing more precise in the case, this court would execute such a trust by making it a provision for maintaining and propagating the *established religion* of the country." No doubt the court would do this; and why? Simply because the *legal presumption* would be that the donor intended a trust and a worship which would be consonant to law. By parity of reasoning, when the trust was admitted to be for the benefit of dissenters, but was otherwise general, the court would limit it to dissenters who were within, in preference to those who were excepted from the toleration act.

Now this is all that is really decided in this noted case. It is true there is a great deal more said about religious and charitable trusts in general; but much of what is said, and especially that part in relation to determining the nature of the trust, from the tenets and practices of its founders, is *obiter,* and is not law at this day, even in England, as I shall presently show. Why, then, should this case be so frequently cited and so much relied upon in this country? That it is so proves that our courts have not always reflected upon the difference in this re-

spect between a country where all religions, at least all forms of the Christian religion, are tolerated and placed upon an equal footing, and one where a particular form of worship is established by law. The case under review, considering the nature of the point decided in it, is *wholly* without weight in this country, because we have no religious system to which it can apply.

We come now to the still more celebrated case of *Attorney-General vs. Shaw*, involving the construction of the Lady Hewley charities. *(7 Simons, 290, in note.)* Lady Hewley, by deed executed in 1704, had conveyed various estates in Yorkshire to trustees upon certain trusts, which, so far as they are required to be noticed here, were as follows, viz.: Out of the rents, issues, and profits "to pay and dispose of such sums of money, yearly or otherwise, to such and so many *poor and godly* preachers for the time being of Christ's *holy gospel*, and to such *poor godly* widows for the time being of *poor and godly* preachers of Christ's *holy gospel*, at such time and times, and for so long time and times, and according to such distributions as the said trustees and managers for the time being or any four or more of them shall think fit." In this case, as well as in that of *Attorney-General vs. Pearson*, a majority of the trustees had become Unitarians, and the bill was filed in behalf of the minority, to have the trusts declared in their favor, and to obtain a removal of the trustees who were Unitarians, and an injunction to restrain them from proceeding to the election of new trustees. It was admitted on both sids in this case, as it was in that of *Attorney-General vs. Pearson*, that the trust was not intended for the benefit of ministers of the established church. The questions, therefore, were nearly identical with those which arose in that case.

The case of *Attorney-General vs. Pearson*, however, arose upon a motion for an injunction, founded upon the pleadings alone. All that was there said, therefore, about a resort to extrinsic parol proof to ascertain the nature of a trust created by deed for religious purposes, was for-

eign to the case. But the case of *Attorney-General vs. Shaw* was heard upon pleadings and proofs. The complainants, adopting the dictum of the Chancellor in *Attorney-General vs. Pearson,* had introduced a mass of evidence to show the particular religious tenets, faith, and belief of Lady Hewley, consisting, among other things, of extracts from her will; also from the will of Sir John Hewley, her husband, and from that of Dr. Colton, one of the trustees appointed by her. They also examined witnesses as to the meaning of the terms "godly preachers," "godly persons," "Presbyterians," etc., at the time of the foundation of the charities. All this testimony was read upon the hearing before both the Vice-Chancellor and the Chancellor, and, as appears from their opinions, was taken into consideration. The Vice-Chancellor put his decree exclusively upon the ground that it was shown that Lady Hewley was a Presbyterian, and that the Presbyterians of her day believed in the divinity of Christ, and in the doctrine of original sin; and hence he held that persons who denied those doctrines could not be entitled to the benefits of the trust. The Chancellor, Lord Lyndhurst, however, although he adopted the views of the Vice-Chancellor in this respect, also placed his decision upon the ground that, Unitarian doctrines being prohibited by law, it was not *to be presumed* that Lady Hewley intended to create a trust in violation of law. After stating the statute, the effect of which was to prohibit the preaching of Unitarian doctrines, he says: "I can not, therefore, bring myself to the conclusion that Lady Hewley intended to promote and encourage the preaching of doctrines contrary to law; that she intended purely to violate the law, it would be contrary to every rule of fair construction and legal presumption to decide." Again he says: "On these *two* grounds then, each of which appears to me to be conclusive: first of all, that I can not presume that this pious lady intended that her estates should be employed to encourage and promote the preaching of doctrines directly at variance with what she must have considered

as essential to Christianity; and, *that she could not intend to violate the law;* on those *two* grounds I feel myself, as a conclusion of fact, compelled to come to this determination: that she did not intend, under the description of *godly preachers*, to include those persons who impugned the doctrine of the trinity."

There was an appeal from the Chancellor's decree to the House of Lords, and my object is to show that in this court, where the whole judicial force of England was assembled, the doctrine of the Vice-Chancellor and the Chancellor, that the objects of the trusts might be inferred from the tenets, faith, and belief of Lady Hewley, was entirely discarded, and that the decree was affirmed solely upon the *second* ground assumed by the Chancellor, viz.: That a trust for the benefit of Unitarians would be *contrary to law*, and, therefore, was not to be presumed. This may be conclusively shown from the report of the case in *9 Clark and Finnelly, 355.* Upon the conclusion of the very elaborate and able argument of the cause in the House of Lords, that body submitted to the judges a series of questions, upon which their opinions were required; only two of which it is necessary to notice. The first was as follows: "Whether the *extrinsic evidence* adduced in this cause, or what part of it, is admissible for the purpose of determining who are entitled, under the terms 'godly preachers of Christ's holy gospel,' 'godly persons,' and the other descriptions contained in the deeds of 1706 and 1707, to the benefit of Lady Hewley's bounty." The fourth was this: "Whether, upon the true construction of the deed of 1704, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, and persons of what are commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of that deed."

Seven of the twelve judges, together with the Chancellor, Lord Cottenham, delivered opinions upon these questions. Of these seven, only two, viz., Justices Cole-

ridge and Williams, were of opinion that the extrinsic evidence was properly admitted. Justices Maule and Erskine were clearly of opinion that no portion of it was admissible. Baron Parke doubted whether any of it was admissible, and Baron Gurney and Chief Justice Tindal, together with Lord Chancellor Cottenham, were of opinion that none of it was admissible, except such as came within the ordinary rule, that parol evidence may be given of the "surrounding circumstances" under which a deed is executed, when its language is not explicit. The Chancellor, after adverting to this as the true rule, says: "I have thought it right to make these observations upon this matter of evidence; as otherwise, the affirmance of the decree might seem to sanction the receiving all the evidence received below, which might tend to introduce much doubt and confusion in other cases. The second of the above questions, being the fourth put to the judges, was answered by the judges in the affirmative; all, except two or three, putting their opinions distinctly on the ground that a trust for the benefit of Unitarians being contrary to law, the presumption was against an intention to create such trust."

So far, therefore, as the House of Lords in England, with the aid of all the judges of the highest courts, can do it, the doctrine that the nature of a trust for religious purposes, created by deed, may be inferred from parol evidence as to the religious faith and tenets of the founder, in the broad sense in which it seems to have been generally understood, is overthrown; or, at least, the doctrine finds no support in this case concerning the charities of Lady Hewley.

But, were it otherwise, and were we to infer in this case, either from the evidence on this subject, or from what appears upon the face of the deed, or any other source, that a trust was intended in favor of persons of a particular religious faith, then I hold it to be clear, that a religious corporation in this State can be the recipient of no such trust, for the reason that its execution would be

entirely inconsistent with the provisions of the act authorizing such corporations. This can be readily shown. The trustees are authorized by Section 4 to purchase and hold real and personal estate, for the use of the *church, congregation, or society.* If they may take a trust limited, as supposed, it may become their duty to administer the trust for the exclusive benefit of a portion only of the congregation or society. This is not authorized by the act. It is repugnant, not to the section to which I have referred alone, but to various other provisions. Section 7 prescribes the qualifications of electors, and it is not in the power of the congregation, nor of any portion of the society, or even of the courts, to change these qualifications, or prescribe any other. The majority of the congregation may be composed of persons of any religious faith, or of no particular faith, and still, their right to vote, and to control the election, is not affected. This is inconsistent with the idea, that the trustees can be expected to execute any trust, except such as is acceptable to the majority of the congregation.

But such a trust would be still more repugnant to the provisions of Section 8. By that section the salary of the minister is put absolutely, and at all times, under the control of a *majority* of the congregation. The trustees have no control over the subject, but are imperatively required to ratify and pay the salary fixed by the majority. Whatever may be thought of the other provisions of the act, this section must forever give to the majority of the congregation the control over the employment of the minister. It would be in vain for any donor of property or funds to the congregation to prescribe the religious faith of the minister to whose support the avails should be devoted; for, until the salary should be fixed by a majority of the congregation, not one dollar of the revenues of the society could be appropriated by the trustees to its payment.

The whole act shows that it was the intention of the Legislature to place the control of the temporal affairs of the societies in the hands of the majority of the cor-

porators, independent of priest or bishop, presbytery, synod, or other ecclesiastical judicatory. This is the inevitable effect of the provision giving to the majority, without regard to their religious sentiments, the right to elect trustees, and to fix the salary of the minister. The courts clearly can not disfranchise any corporator who possesses the qualifications prescribed by statute.

Suppose, then, the majority in a particular congregation choose to change entirely their form of worship; how are they to be controlled? Should the court assume in the exercise of its jurisdiction over trusts to direct the trustees to employ a minister of a particular faith, the whole object of the direction might be defeated by the employment of a minister wholly unacceptable to those who procured the interference of the court; and even if the court went so far as to direct *whom* they should employ, still the majority would have the right to fix the salary, and the court would clearly have no power to control such majority in the exercise of this discretion, which the statute confides wholly to them. The act has, in truth, accomplished what the public sentiment in this country would seem to demand—that is, the entire separation of the functions of the ecclesiastical and temporal judicatories, and has limited the former to their proper sphere of control over the spiritual concerns of the people. If this statute is properly construed, we shall have fewer examples of temporal courts engaged in the inappropriate duty of deciding upon confessions of faith, and shades of religious belief and points of doctrine too subtle for any but ecclesiastical comprehension.

The courts have not hitherto fully considered the broad distinction that exists between a voluntary association which may adopt such rules and regulations and such mutual obligations not inconsistent with law, as it may see fit, and a corporation whose powers and functions are prescribed by statute. If a society wishes to devote its property to an unchangeable form of worship and to tie down its members to a Procrustean bed of creeds and

confessions of faith, it must remain a voluntary association, and not commit the management of its affairs to a corporation.

I by no means deny that a grantor of property to the trustees of a religious corporation may annex such conditions to the grant as he may choose, not inconsistent with law; and that the trustees may take the property subject to the conditions. For instance, property may be conveyed to them to be held *so long* as the society continues in a certain ecclesiastical connection, or so long as it supports a minister of a certain faith; and this condition, if explicit and clear, and free from all doubt or obscurity, would be good. An uncertain condition would be void.

The title of the trustees under such a deed would be good so long as a majority of the corporators chose to abide by the conditions; and when that was departed from, their title would be forfeited. This is widely different from a trust, which is to be enforced in opposition to the will of the majority.

It follows from these principles, that neither presbytery, nor synod had any control over the Associate Congregation of Cambridge in respect to the minister whom they should employ. That depended upon the trustees and a majority of the congregation. His deposition or excommunication had nothing whatever to do with the right of the congregation to employ him, so far as the administration of its temporalities was concerned; although it might subject them, or some portion of them, to spiritual censure or ecclesiastical penalties.

While, therefore, it is settled so far as these parties are concerned, by the acquiescence of the defendants in the decree of the Supreme Court, that the trustees had and still have no right to employ Dr. Bullions, there is no reason for following up that error by requiring them to account.

It may be well briefly to recapitulate here the principal points which I have attempted to maintain. They are:

1. That this court can not review those portions of the decree of the Supreme Court not appealed from. 2. That a religious corporation, under our statute, consists not of the trustees alone, but of the members of the society. That the society itself is incorporated, and not merely the trustees, and its members are corporators. 3. That the relation of the trustees to the society is not that of a private trustee to the *cestui que trust;* but they are the managing officers of the corporation, and trustees in the same sense in which the president and directors of a bank, or of a railroad company are trustees, and are invested in regard to the temporal affairs of the society with the powers specially conferred by the statute, and with the ordinary discretionary powers of similar corporate officers. 4. That an incorporated religious society, under our law, does not belong to the class of ecclesiastical corporations in the sense of the English law, which were composed entirely of ecclesiastical persons and subject to the ecclesiastical judicatories; but are to be regarded as civil corporations, governed by the ordinary rules of the common law. 5. That if it be granted that courts of equity, by virtue of their general jurisdiction over trusts, may exercise some degree of control over the trustees of a religious corporation in cases of gross abuse of their trust; yet, they have no power to remove those officers, who derive their offices directly from the enactments of the Legislature; nor have they power to prescribe qualifications for electors of such trustees other than those prescribed by the statute. 6. That the trustees of a religious corporation under our statute can not take a trust for the sole benefit of members of the church as distinguished from other members of the congregation, nor for the benefit of any portion of the corporators to the exclusion of others, no trust being authorized by the statute except for the use and benefit of the whole society. 7. That where, in a deed executed to trustees for religious purposes, the use is expressed in general and not in specific terms, it can not be *inferred* from the religious tenets and faith of

the grantor that it was intended to limit the use to the support of the particular doctrines which he professed or the religious class to which he belonged; although, if the language creating the trust be ambiguous, evidence of the surrounding circumstances, and among them perhaps of the faith of the donor, may be received, as in other cases, to aid in its construction. 8. That the trustees of a religious corporation in this State can not receive a trust limited to the support of a particular faith, or a particular class of doctrines, for the reason that it is inconsistent with those provisions of the statute which give to the majority of the corporators, without regard to their religious tenets, the entire control over the revenues of the church.

The decree of the Supreme Court should be affirmed.

The opinion of W. F. Allen, J., is omitted here.

Denio, J., concurred in the opinion of Allen, J., and dissented from the eighth proposition stated by Selden, J. Gardiner, Ch. J. Parker, and Edwards, Js., concurred in the conclusions of Selden, J. Ruggles, J., was absent.

Decree affirmed.

McGinnis *et al vs.* Watson *et al.*
The Supreme Court of Pennsylvania,
Western District—Pittsburg, 1861.
Reported in 41 Pennsylvania State Reports, 9.

The opinion of the Court was delivered May 8, 1862, by *Lowrie, C. J.*—About 1803, the Unity Congregation, belonging to the Associate or Seceder Church of North America, purchased a lot of ground in Venango township, Butler County, and erected a meeting-house upon it, and there continued to worship God in unity until 1858. Then the Seceder Synod of North America, by a very large majority, and after many years' consideration, formed a union with the Associate Reformed Synod; and a majority of the Unity Congregation, and the Shenango Presbytery, to which it belongs, have approved of the union thus formed. A minority of the congregation, and several ministers of the Associate Church, disapprove of it, and the minority of the congregation claim the lot and meeting-house. Which party is entitled to it? The Common Pleas decided in favor of the minority; is this right?

Our fundamental law on this subject is written in the Constitution, Art. 9, Sec. 3: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, and no human authority can, in any case whatever, control or interfere with the rights of conscience."

Of course this law was not intended to exempt any religious society from the respect that is due to the organization and moral and social order of the State, or from the necessity of holding its land under the State, and according to its laws. But it does mean, that, for its own internal order, and for the mode in which it fulfills its functions, it is to be a law unto itself, or have its law within itself, provided it keep within the bounds of social order and morality. This is the same rule that the law applies to individuals in their contracts about legitimate business. Their contracts, and their own interpretation of them, so far as they can be ascertained, and the custom

of the trade in which they are engaged, are the elements out of which we derive the law of the case which they present for our decision.

In its most general form, therefore, our question is: Judging this congregation by its own order, was its union with the Associate Reformed Church, and incorporation into the United Presbyterian Church, regular?

But this raises another question: How far is the congregation bound by the act of its synod? Religious societies are not free, if they may not choose their own form of organization. They may organize as independent churches, and then their law is found in their own separate institutions, customary or written. Or they may organize as associated churches, and then their law is to be found in their own rules, and in those of the associated organism. When persons join a church belonging to such a general organism, they assent to its laws, and are entitled to the implication that the affairs of the church are to be managed according to them. This result of our law and of the relations of associates in churches is so clear, obvious, and necessary, that we need not dwell upon it.

It has, however, a qualification already alluded to in general, which ought perhaps to be more specially stated. If the general organism extend over several States, it may require much more than ordinary charity, prudence, and discretion in directing its legislation and action so as to preserve its sphere of influence and usefulness in its integrity. If it should make terms of communion, or adopt a course of ecclesiastical action in any form, that is hostile to the policy of one or more of the States embracing its churches, it may induce a perfectly lawful division; for no State can help to sustain an organism that it judges to be hostile to its own principles, and none of its citizens can be presumed by law to have intended to concede authority for such hostile action. It was under the influence of this principle that our American churches separated from their mother churches, in England, Scotland, and Holland, before and after our Revolution, without being

chargeable with secession. It has also divided many of our churches, between North and South, or excluded them altogether from any foothold in the South. The Church of Rome was, in many instances, saved from such a division, by submitting to laws, as in England, or by entering into concordats with States, by which its ecclesiastical action was greatly restrained by subjection to civil law.

We state this limitation merely by way of precaution; for it is not needed in this case. But, subject to this limitation, our question may now be more specially stated thus: Has the act of union of the Associate and Associate Reformed Synods been so conducted, that, judged by the law of this congregation, and of the general organism to which it belongs, it can now be properly declared to be a member of the United Presbyterian Church? The congregation was divided by the act of union; and that part of it which is acting in harmony with its own law, must be approved and sustained by the State law. That one of them has obtained a charter of incorporation, has no influence on the question, and is not pretended to have. The title depends upon the legitimate, orderly, and regular maintenance of the organized congregation, or succession of associate owners.

We desire it to be noticed that, in this statement of the question, we adopt fully the views of Lord Chancellor Eldon in the case of *The Attorney-General vs. Pearson, 3 Meriv., 400*, relative to the usage or customs of the congregation, as the law of the case; while we do not adopt his view in treating it as a trust created by the vendor, and to be used according to his intention. No doubt there are cases where such titles are really trusts, by reason of donations for special purposes; but this is not so often found in cases of church property as in gifts for charitable uses. Questions of this kind have often been obscured by treating them as trusts by the grantor. It is quite natural to call them so, because the rights under them have been usually enforced in equity as trusts. They are analogous to trusts strictly so called, but not identical

with them in every respect. As between the trustees holding the legal title, and the congregation holding the equitable title, they are trusts. But as between the congregation and any other person, they are simply titles.

In the case of *The Methodist Church vs. Remington, 1 Watts, 226,* Chief Justice Gibson treated such a title as a trust; but as one not created by the vendor, but by the persons paying the purchase-money, and resulting to them in a failure of purpose; and, therefore, we may say, belonging to them so long as they keep up a regular organization and purpose. And this Court has taken this view expressly in these different decisions: *3 Harris, 500; 5 Id., 96; 9 Casey, 424;* the first of which was by Chief Justice Gibson, and the second of which he participated in and heartily approved. The same is decided in *Gibson vs. Armstrong, 7 B. Mon., 481.* That it is not a trust, but a title in the congregation, when property is purchased by itself for its own use, is quite manifest from the Act of 1731, under which this purchase was made, which contemplates only titles, and from the facts that the property may be sold by the congregation, or by the sheriff for its debts; the change of its creed violates no duty to the grantor, and the title does not revert to him on a dissolution of the society.

In *Craigdallie vs. Aikman, 1 Dow's Parl. Rep., 1,* Lord Eldon laid down the rule that a congregation's title depends upon its adherence to the opinions and principles in which it had originally united, and this has been followed and repeated in many cases. But we would grievously misapply this rule if we should interpret it as meaning that no congregation can change any material part of its principles or practices without forfeiting its property. This would be imposing a law upon all churches that is contrary to the very nature of all intellectual and spiritual life; for it would forbid both growth and decay; not *prevent,* for that is impossible. The guaranty of freedom to religion forbids us to understand the rule in this way.

And all history forbids it. Let us be indulged in so much detail, in the illustration of this, as is necessary to make the principle clear by means of the facts which it has produced. Many of the principles of human action depend so closely upon the peculiar development of a given people that they are not susceptible of clear illustration, except by instances and cases drawn from the conduct, life, and history of that people. But on the other hand very many of them are so common to all humanity that any illustration of them must be inadequate that does not embrace a wide sphere of human conduct both in time and space.

The principle is, that all intellectual and spiritual growth involves some change or development of opinions, principles, and practices, and therefore some change in the systems which are constituted of those opinions, principles, and practices; for these are the elements of the systems and decide their character. And the *fact* is that from the very origin of Christianity, such a change has been continually going on in the Christian Church, in all its branches, congregations, and members, without producing a forfeiture of the property held even by those in which the change has been most decided. Changes in principle and practice, are not incompatible with legitimate social succession, but are necessary elements of its normal progress. All denominations admit that all others must change in the progress toward union, even though they may suppose their own system too perfect to undergo any change. Let the facts of history prove this legitimate progress; . . .

We might have decided this case by saying that there is nothing in the plaintiff's evidence that shows that the action complained of, judged by the constitution and usages of the Seceder Church, was brought about by any excess of authority on the part of the presbyteries and synod. But we have preferred to treat the case as if the burden of proof was on the defendants, and show affirmatively that the proceeding is in harmony with the

authority usually admitted to belong to those bodies.

Among the cases that sustain the foregoing views is that of *The Attorney-General vs. Gould, 2 Law Reporter (London), 495,* where the church lot was purchased by and " for the use of the congregation of Particular Baptists," etc., which congregation then practiced close communion, though in association with other Baptist churches that allowed free communion. After many years, a majority agreed to allow free communion in this church also, and in a suit by the minority to prevent it, the Master of the Rolls, Sir John Romilly, decided that the majority of an independent congregation had power to make such a change of its usages, and that there was nothing in the form of the deed to prevent it.

But one of the very ablest judicial opinions that we find in our books on this subject is that of Chief Justice Marshall, of Kentucky, in *Gibson vs. Armstrong,* wherein it is decided that in general organizations of united churches, the law of the general organization is binding on all the individual churches, and that even a majority seceding, lose all their rights in the church property. And this view we find ably supported by several other decisions: *Hopper vs. Straws, 14 B. Monroe, 48; Den vs. Pilling, 4 Zabriskie, 653; The John Island Church Case, 2 Richardson's Eq. R., 215.* A contrary rule would encourage partisan strifes in congregations and in general church organisms, for the purpose of unjustly getting possession of church property, and would endanger the peace and effective social force of all church unions; a position which the State and its law ought not to occupy. We think the defendants, now incorporated, are entitled to the property.

Decree of the Common Pleas is reversed, and the bill of the plaintiffs is dismissed, at their costs.

Watson *vs.* Jones.

The Supreme Court of the United States,
December, 1871.

Reported in 13 Wallace U. S. Reports, 679.

Statement of the case.

On the 21st of July, 1868, one Jones, his wife, and one Lee, filed a bill in chancery in the Circuit Court of the United States for the District of Kentucky against Messrs. Watson and Galt, Fulton, Farley, and Avery, as the corporation of the Walnut Street Presbyterian Church, in the city of Louisville, Kentucky, and against Messrs. McDougall, McPherson and Ashcroft, as trustees of said church. The complainants alleged that they were citizens of Indiana, that the persons named were citizens of Kentucky, and that the church corporation named had been created by Kentucky. They further alleged that they were members in good standing of the said church, and that the defendants, Fulton and Farley, who pretended, without right, to be trustees, supported as such by the defendants, Watson and Galt, who pretended, without right, to be ruling elders, were about to take unlawful possession of the church building, and to prevent one Hays, who was the rightful pastor of the church, from ministering therein, refusing to recognize him as pastor, and refusing to recognize as ruling elder one Hackney, who was the sole lawful ruling elder, and that Hackney, as elder, and McDougall, McPherson, and Ashcroft, as trustees, whose duty it was to protect the rights thus threatened, refused to take any measures to that end.

The defendants, Hackney, McDougall, McPherson, and Ashcroft, answered, admitting the allegations of the bill, and that, though requested, they had refused to prosecute legal proceedings in the matter, because, as they thought, any effort to that end in the courts of the State of Kentucky would prove useless.

The defendants, Watson, Galt, Fulton, and Farley, answered declaring their belief that the complainants were lately citizens of Kentucky, and that their citizen-

ship in Indiana was merely for the purpose of filing this bill in the Federal Court, and denying almost every allegation of the bill.

The circuit court declared that it seemed to it that the complainants were members of the Third or Walnut Street Presbyterian Church, in Louisville, and as such had a beneficial interest in the church building and other property in the pleadings mentioned.

That the Reverend J. S. Hays was pastor; Hackney, Avery, McNaughton, and Leach, ruling elders; and McDougall, McPherson, and Ashcroft, trustees; and that they were respectively entitled to exercise whatever authority in the said church, or over its members or property, rightfully belonged to pastor, elders, and trustees, respectively, in churches in connection with "The Presbyterian Church in the United States of America," Old School, and according to the regulations and usages of that church.

That McDougall, McPherson, and Ashcroft, trustees, were in regular succession from the trustees named in the deed of conveyance of the church property in 1853, and likewise in regular succession from the trustees named in the act of incorporation, and that as such trustees they were entitled to the exclusive control of the church building and other property of said church for the purposes of worship by the members of said church, in accordance with the regulations and usages of the Presbyterian Church in the United States of America.

That those only were to be recognized as members of the Walnut Street Church who adhered to and recognized the authority of the Presbyterian Church in the United States of America, and the various church judicatories which submit to its jurisdiction; and in determining what was the true Presbytery of Louisville, and the true Synod of Kentucky, having jurisdiction of the said Walnut Street Presbyterian Church, its officers and members, *this court and all other civil tribunals were con-*

cluded by the action of the General Assembly of the said Presbyterian Church in the United States of America.

That those members of the Walnut Street Church who worshiped statedly at the church edifice, and who had as their pastor the Reverend J. S. Hays, and who recognized Hackney, Avery, Leach, and McNaughton as ruling elders, and McDougall and McPherson as trustees, including all those connected with them, who had been received into said church since January 1, 1866, under Hackney, Avery, Leach, and McNaughton, as elected, or under the ministration of Hays as pastor, constituted the Third or Walnut Street Presbyterian Church in Louisville, and the sole beneficiaries for whose use the property mentioned in the pleadings was dedicated; and that the said persons, together with their pastor, elders, and trustees, had the exclusive right to use the same according to the regulations and usages of the Presbyterian Church in the United States of America.

That all those persons who pretended to be members of the said church, but who did not recognize Hays as pastor, or Hackney, Avery, Leach, and McNaughton as elders, or McDougall, McPherson, and Ashcroft, as trustees, and who recognized Watson, Galt, Gevin, and Heeter as elders, and Fulton, Farley, and Polk as trustees, and worshiped separately and apart from those hereinbefore declared to be the sole beneficiaries of said property, and who denied the authority of Hays as pastor, and the ecclesiastical authority of the McMillan Presbytery of Louisville, and the Lapsley Synod of Kentucky, did not have any connection with, nor were they members of, the Third or Walnut Street Presbyterian Church, for whose use the property in question was conveyed and dedicated, nor had the said persons, or any of them, any beneficial interest in it, nor were they entitled to the use of it in any way whatever as members of the said church.

It was thereupon decreed:

1. That the defendants, Heeter, Gevin, and Polk be enjoined from taking possession of, and from using or con-

trolling the church edifice, or other property of the Walnut Street Church, except as they, or any of them, may choose to attend religious worship, or other religious exercises, in the same manner as other persons not officers or members of said church.

2. That the defendants, Watson, Galt, Fulton, Heeter, Gevin, Polk, Farley; and all others, be enjoined from so using or controling the said church edifice, or other property of the church, as in any wise to interfere with the ministrations therein of Hays as pastor, or with the exercise by him and by Hackney, and others, recognized as elders in the said church by those herein declared to be the sole beneficiaries of the said property, of any authority in the said church or over its property or members which rightfully belongs to the pastors and elders of the churches in connection with and according to the usages of the Presbyterian Church of the United States of America.

3. That the defendants, *Watson*, *Galt*, *Heeter*, *Gevin*, *Fulton*, *Farley*, and *Polk*, and all others, be enjoined from using and controlling the church edifice and property in any other manner than as the property exclusively of the persons hereinbefore declared to be the Third or Walnut Street Presbyterian Church of Louisville, and the sole beneficiaries of said property, having Hays as pastor, and recognizing Hackney, Avery, Leach, and McNaughton as elders, and McDougall, McPherson, and Ashcroft as trustees. And that they, and all others, be enjoined from interfering in any manner with the use of the said property by the members of the said church hereinbefore declared to be such, and by such as might be hereafter admitted into said church, according to its forms, and who are or might become connected with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America, and the several judicatories which submit to the authority of said assembly; and from hindering or preventing anyone from worshiping in said church, or participating in any

of its religious exercises, according to the usages of the said church.

From this decree *Watson and the other* defendants appealed.

Mr. Justice Miller delivered the opinion of the court:

This case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the State for the maintenance of rights which the church has refused to acknowledge, or found itself unable to protect. Much as such dissensions among the members of a religious society should be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority; the courts when so called on must perform their functions, as in other cases.

Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us. . . .

One or two propositions which seem to admit of no controversy are proper to be noticed in this connection. 1. Both by this act of the Kentucky Legislature creating the trustees of the church as a body corporate, and by the acknowledged rules of the Presbyterian Church, the trustees were the mere nominal title-holders and custodians of the church property, and other trustees were, or could

be, elected by the congregation, to supply their places once in every two years. 2. That in the use of the property for all religious services, or ecclesiastical purposes, the trustees were under the control of the church session. 3. That by the constitution of all Presbyterian churches, the session, which is the governing body in each, is composed of the ruling elders and pastor, and in all business of the session the majority of the members govern, the number of elders for each congregation being variable.

The trustees obviously hold possession for the use of the persons who, by the constitution, usages, and laws of the Presbyterian body, are entitled to that use. They are liable to removal by the congregation for whom they hold this trust, and others may be substituted in their places. They have no personal ownership or right beyond this, and are subject in their official relations to the property, to the control of the session of the church.

The possession of the elders, though accompanied with larger and more efficient powers of control, is still a fiduciary possession. Except by an order of the session, in regular meeting, they have no power to make any order concerning the use of the building; and action of the session is necessarily in the character of representatives of the church body by whose members it was elected.

If then, this true body of the church, the members of that congregation, having rights of user in the building, have in a mode which is acknowledged by the canons of the general church in this country elected and installed other elders, it does not seem to us inconsistent or at variance with the nature of the possession we have described, and which the Chancery Court orders to be restored to the defendants, that they should be compelled to recognize these rights, and permit those who are the real beneficiaries of the trust held by them, to enjoy the uses, to protect which that trust was created. . . .

The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them,

be profitably classified under three general heads, which of course do not include cases governed by considerations applicable to a church established and supported by law as the religion of the State.

1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

2. The second is when the property is held by a religious congregation, which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and as far as church government is concerned, owes no fealty or obligation to any higher authority.

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.

In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is anyone so interested in the execution of the trust as to have a standing in court, it must

be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters.

In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrines of the Holy Trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine, and as a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law throws around the trust is the same. And though the task may be a delicate one and a difficult one, it will be the duty of the court, in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so varient as to defeat the declared objects of the trust. In the leading case of this subject, in the English courts of the *Attorney-General vs. Pearson* (Merivale, 353), Lord Eldon said: "I agree with the defendants that the religious belief of the parties is irrelevant to the matters in dispute, except so far as the King's Court is called upon to execute the trust." That was a case in which the trust-deed declared the house which was erected under it was for the worship and service of God. And though we may not be satisfied with the very artificial and elaborate argument by which the

Chancellor arrives at the conclusion, that because any other view of the nature of the Godhead than the Trinitarian view was heresy by the laws of England, and anyone giving expression to the Unitarian view was liable to be severely punished for heresy by the secular courts, at the time the deed was made, that the trust was therefore, for Trinitarian worship, we may still accept the statement that the court has the right to enforce a trust clearly defined on such a subject.

The case of Miller *vs.* Gable *(2 Denio, 492)*, appears to have been decided in the Court of Errors of New York on this principle, so far as any ground of decision can be gathered from the opinions of the majority of the court as reported.

The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society.

In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority, in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property

from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might have been found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respects their views of religious truth.

Of the cases in which this doctrine is applied no better representative can be found than that of *Shannon vs. Frost* (3 B. Monro, 253), where the principle is ably supported by the learned Chief Justice of the Court of Appeals of Kentucky.

The case of *Smith vs. Nelson* (18 Vermont, 511) asserts this doctrine in a case where a legacy was left to the Associate Congregation of Ryegate, the interest whereof to be paid annually to their minister forever. In that case, though the Ryegate congregation was one of a number of Presbyterian churches connected with the general Presbyterian body at large, the Court held that the only inquiry was whether the society still exists, and whether they have a minister chosen and appointed by the majority, and regularly ordained over the society, agreeable to the usage of that denomination. And though we may be of opinion that the doctrine of that case needs modification, so far as it discusses the relation of the Ryegate congregation to the other judicatories of the body to which it belongs, it certainly lays down the principle correctly if that congregation was to be treated as an independent one.

But the third of these classes of cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved,

and to other considerations, is every way the most important.

It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government.

The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the general assembly over all. These are called, in the language of the church organs, "judicatories," and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases.

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating

weight of judicial authority is, that, wherever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

We concede at the outset that the doctrine of the English courts is otherwise. In the case of *Attorney-General vs. Pearson*, cited before, the proposition is laid down by Lord Eldon, and sustained by the peers, that it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard. And in the subsequent case of *Craigdallie vs. Aikman* 2 Bligh, 529), the same learned judge expresses in strong terms his chagrin that the Court of Sessions of Scotland, from which the case had been appealed, had failed to find on this latter subject, so that he could rest the case on religious belief, but had declared that in this matter there was no difference between the parties. And we can very well understand how the Lord Chancellor of England, who is, in his office, in a large sense, the head and representative of the established church, who controls very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. The dissenting church in England is not a free church in the sense in which we apply the term in this country, and it was much less free in Lord Eldon's time than now. Laws then existed upon the statute book hampering the free exercise

of religious belief and worship in many most oppressive forms, and though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. And it is quite obvious, from an examination of the series of cases growing out of the organization of the Free Church of Scotland, found in Shaw's Reports of Cases in the Court of Sessions, that it was only under the pressure of Lord Eldon's ruling, established in the House of Lords, to which final appeals lay in such cases, that the doctrine was established in the Court of Sessions, after no little struggle and resistance. The full history of the case of *Craigdallie vs. Aikman*, in the Scottish court, which we cannot further pursue, and the able opinion of Lord Meadowbank in *Gabraith vs. Smith* (15 Shaw, 808), show this conclusively.

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to creat tribunals for the decisions of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and lead to the total suppression of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of

questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which, as to each, constitute a system of ecclesiastical law and religious faith, that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

We have said that these views are supported by the preponderant weight of authority in this country, and for the reasons which we have given, we do not think the doctrines of the English Chancery Court on this subject should have with us the influence which we would cheerfully accord to it on others.

We have already cited the case of Shannon *vs.* Frost, in which the appellate court of the State where this controversy originated, sustains the proposition clearly and fully. "This Court," says the Chief Justice, "having no ecclesiastical jurisdiction, can not revise or question ordinary acts of church discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property, and the use of it. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regu-

larly or irregularly, cut off from the body of the church."

In the subsequent case of *Gibson vs. Armstrong (7 B. Monro., 481)*, which arose out of the general division of the Methodist Episcopal Church, we understand the same principles to be laid down as governing that case, and in the case of *Watson vs. Avery* (2 Bush, 332) the case relied on by the appellants as a bar, and considered in the former part of this opinion, the doctrine of *Shannon vs. Frost* is in general terms conceded, while a distinction is attempted which we shall consider hereafter.

One of the most careful and well-considered judgments on the subject is that of the Court of Appeals of South Carolina, delivered by Chancellor Johnson, in the case of *Harmon vs Dreher (2 Speer's Equity, 87)*. The case turned upon certain rights in the use of church property claimed by the minister, notwithstanding his expulsion from the synod as one of its members. "He stands," says the Chancellor, "convicted of the offences alleged against him, by the sentence of the spiritual body of which he was a voluntary member, and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of the religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether, if held, were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the synod or to his denomination. . . . When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them." The principle is reaffirmed by

the same court in the *John's Island Church Case* (2 Richardson's Equity, 215).

In Den *vs.* Bolton, the Supreme Court of New Jersey asserts the same principles, and, though founding its decision mainly on a statute, it is said to be true on general principles.

The Supreme Court of Illinois, in the case of *Ferraria vs. Vasconcelles* (23 Illinois, 456), refers to the case of *Shannon vs. Frost* with approval, and adopts the language of the court that "the judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they or their churches might determine, and thereby submit to the ecclesiastical power, and cannot now invoke the supervisory power of the civil tribunals."

In the very important case of *Chase vs. Cheny*, recently decided in the same court, Judge Lawrence, who dissented, says: "We understand the opinion as implying that in the administration of ecclesiastical discipline, and where no other right of property is involved than loss of the clerical office or salary incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, and that its decision of that question is binding on the secular courts." And he dissents with Judge Sheldon from the opinion because it so holds.

In the case of *Watson vs. Farris* (45 Missouri, 183), which was a case growing out of the schism in the Presbyterian Church in Missouri, in regard to this same declaration and testimony, and the action of the General Assembly, that court held that whether a case was regularly or irregularly before the Assembly was a question which the Assembly had no right to determine for itself, and no civil court could reverse, modify, or impair its action in a matter of merely ecclesiastical concern.

We cannot better close this review of the authorities than in the language of the Supreme Court of Pennsylvania, in the case of the *German Reformed Church vs. Leibert*

(3 Barr, 291): "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals."

In the subsequent case of *McGinnis vs. Watson* (41 Pennsylvania State, 21) this principle is again applied and supported by a more elaborate argument.

The Court of Appeals of Kentucky, in the case of *Watson vs. Avery*, before referred to, while admitting the general principle here laid down, maintains that when a decision of an ecclesiastical tribunal is set up in the civil courts, it is always open to inquiry whether the tribunal acted within its jurisdiction, and if it did not, its decision could not be conclusive.

There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law, without a due regard to precision in its application. As regards its use in the matters we have been discussing, it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should, at the instance of one of its members, entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said, in a certain general sense very justly, that it was

because the General Assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable.

But it is a very different thing where a subject—matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions.

And this is precisely what the Court of Appeals of Kentucky did in the case of *Watson vs. Avery.* Under cover of inquiries into the jurisdiction of the synod and presbytery over the congregation, and of the general assembly over all, it went into an elaborate examination of the principles of the Presbyterian church government, and ended

by overruling the decision of the highest judicatory of that church in the United States, both on the jurisdiction and the merits; and, substituting its own judgment for that of the ecclesiastical court, decides that ruling elders, declared to be such by that tribunal, are not such, and must not be recognized by the congregation, though four-fifths of its members believe in the judgment of the Assembly and desired to conform to its decree.

But we need not pursue this subject further. Whatever may have been the case before the Kentucky court, the appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action, and refuse to abide by its judgment. They have first erected themselves into a new organization, and have since joined themselves to another totally different, if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property, or to the use of it, which is the subject of this suit.

The novelty of the questions presented to this court for the first time, their intrinsic importance and far-reaching influence, and the knowledge that the schism in which the case originated has divided the Presbyterian churches throughout Kentucky and Missouri, have seemed to us to justify the careful and laborious examination and discussion which we have made of the principles which should govern the case. For the same reasons we have held it under advisement for a year, not uninfluenced by the hope that, since the civil commotion, which evidently lay at the foundation of the trouble, had passed away, that charity, which is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all the Christian virtues, would have brought about a reconciliation. But we have been disappointed. It is not for us to determine

or apportion the moral responsibility which attaches to the parties for this result. We can only pronounce the judgment of the law as applicable to the case presented to us, and that requires us to affirm the decree of the circuit court as it stands.

Decree affirmed.

The Chief Justice did not sit on the argument of this case, and took no part in its decision.

Mr. Justice Clifford and Mr. Justice Davis dissented.

Gilmer *vs.* Stone.

Appeal from the Circuit Court of the United States for the Southern District of Illinois,

March, 1887.

Reported in 120 U. S. Reports, 586.

Mr. Justice Harlan delivered the opinion of the court:

Robert Gilmer, late of Irish Grove, Menard County, Illinois, died December 31, 1883, having made a last will by which he disposed of his entire estate, consisting of about four thousand dollars in personal property, and three or four hundred acres of land in that State. The eleventh clause of the will is in these words: "I also, after paying all debts and claims against my estate, bequeath and devise the remainder of my estate to be equally divided between the board of foreign and the board of home missions." The object of the present suit is to obtain a decree declaring that clause to be void, and directing the estate of the testator, after meeting the debts, and the bequests contained in other clauses to be paid to the complainant, the uncle and the only heir-at-law of the decedent.

The "Board of Foreign Missions of the Presbyterian Church in the United States of America," and the "Board of Home Missions of the Presbyterian Church in the United States of America"—corporations created under the laws of New York—severally appeared, were made defendants, and filed answers, each claiming the right to share in the devise in the eleventh clause of the will. The executors admit the justice of these claims, but ask the direction of the court in the premises. To these answers a general replication was filed; and, the cause having been heard upon the pleadings and proofs, the bill was dismissed with costs.

It is agreed in the case that the Baptist, Methodist, Episcopal, and other churches, like the Presbyterian Church in the United States of America, have boards of home and foreign missions; consequently, it is contended the eleventh clause of the will is void for uncertainty as to the donee and the purposes of the gift. In this view

we do not concur. It is undoubtedly the rule, in respect to the testamentory disposition of property, real and personal, that uncertainty either as to the subject or object of a devise will be fatal to its validity. But that rule has no application here; for, if there were no other facts in the case than that there are numerous boards which may be generally described by the words, the "board of foreign missions," and "the board of home missions," the devise in the eleventh clause would not fail. With respect to charities, gifts may be good which, with respect to individuals, would be void; "and where there are two charities of the same name, the legacy will be divided between them, if it cannot be ascertained which was the intended object."—1 Jarman on Wills, 376. Can it be ascertained by competent evidence which of these various boards were the objects of the testator's bounty?

In the fourth clause of the will, the testator bequeathed his library to the Presbyterian church of Irish Grove; in the ninth, five hundred dollars toward the erection of a Presbyterian church in Greenview, Illinois, provided the same was built within two years from the date of the will; otherwise the money should revert to his estate; and in the tenth, he bequeathed fifty dollars to be paid on the minister's salary of the Presbyterian church of Irish Grove for the year 1884.

And there was extrinsic evidence to the following effect: That the testator had been for many years a member and ruling elder of the Irish Grove Presbyterian Church, one of the local congregations of the Presbyterian Church in the United States of America; that collections were annually taken up in that congregation for the various boards of that church, including its boards of foreign and home missions; that, when it was announced from the pulpit that collections would be taken for the Board of Foreign Missions or Board of Home Missions, without, in words, naming the Presbyterian Church, all such collections, with the knowledge and assent of the church session, of which the testator was an active and zealous

member, were, without exception, sent to the officers of the Presbyterian Boards of Foreign and Home Missions, in New York City, and regular reports thereof made to the session; that the testator took especial interest in the work of those particular boards, and uniformly contributed thereto; and that he did not, so far as his pastor or associates in the church session knew, make contributions to the societies of any other church, except to the Bible Society, which was sustained by several religious organizations.

Of the competency of this evidence there can be no doubt. The purpose of it was to place the Court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as "the board of foreign and the board of home missions"; and thus the Court is enabled to avail itself of the light which the circumstances, in which the testator was placed at the time he made the will, would throw upon his intention. "The law is not so unreasonable," says Mr. Wigram, "as to deny to the reader of an instrument the same light which the writer enjoyed."—Wigram on Wills, 2d Amer. ed., 161. The proof made a case of latent ambiguity. Such an ambiguity may arise, "either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description; or, secondly, it may arise where the will contains a mis-description of the object or subject." *Patch vs. White*, 117 V. S., 310, 217. In the same case it was observed that, "as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence." See, also, *Allen's Executors vs. Allen*, 18 How., 385, 393; *Hincklay vs. Thatcher*, 139 Mass., 477; *Breckinridge vs. Duncan*, 2 A. K. Marsh (Ky.), 50, 51; *Morgan vs. Burrows*,

45 Wis., 211, 217; *Brewster vs. McCall.* 15 Conn., 273; *Tilton vs. Society*, 60 N.H., 377, 382; 1 Jarman on Wills, 423, 431; 1 Greenl. Ev., Sec. 290.

Construing, then, the will with reference to the extrinsic evidence of the uniform relations of the testator to the subject of foreign and home missions, and to certain societies engaged in that kind of work, it is not to be doubted that, in the eleventh clause, he had in mind the boards of foreign and home missions of the general religious society or organization of which he was a member and officer. The words of the will very well apply to such an object, and, therefore, in so interpreting its provisions, no violence is done to the language employed by the testator.

It is, also, contended that the Boards of Foreign and Home Missions of the Presbyterian Church in the United States of America are foreign religious societies, or foreign societies organized for religious purposes, and as such, can not, under the laws of Illinois, take exceeding ten acres of land each, and that the devise in the eleventh clause, being of more than three hundred acres jointly, is void and must fail.

In the case of *Christian Union vs. Yount*, 101 V. S., 352, 360, decided in 1870, we considered the question whether a conveyance made in 1870, by a citizen of Illinois, of real estate there situated, of the value of $10,000, to the American and Foreign Christian Union, a New York corporation, was void under the laws of Illinois—the object of that corporation being, "by missions, colportage, the press, and other appropriate agencies, to diffuse and promote the principles of religious liberty and a pure evangelical Christianity, both at home and abroad, wherever a corrupt Christianity exists." The validity of the conveyance was sustained, upon the ground that the law of Illinois, as it existed in 1870, did not preclude a benevolent or missionary corporation of another State, being thereunto authorized by its charter, from taking title to real

estate within her limits, by purchase, gift, devise, or in any other manner.

It is, however, insisted that the force of that decision is weakened, if not destroyed, by the failure of the court to refer to Sec. 44 of Chap. 24 of the Revised Statutes of 1845, making it lawful for "the members of any society or congregation" theretofore formed, or hereafter to be formed, "for purposes of religious worship," to "receive by gift, devise, or purchase, a quantity of land not exceeding ten acres, and to erect or build thereon such houses and buildings as they may deem necessary for the purposes aforesaid, and to make such other use of the land and make such other improvements thereon as may be deemed necessary for the comfort and convenience of such society or congregation."—Rev. Stat. Ill., 1845, p. 120. Counsel overlook the fact that the court, in *Christian Union vs. Yount*, referred incidentally, and as indicating the general course of legislation in Illinois, to the like provision in the Act of 1872. No comment was made upon that provision, for the reason that it had no application to the case; there being no claim, as there could not well have been, that the American and Foreign Christian Union was, within the meaning of the statute, a society or congregation "for purposes of religious worship."

In *St. Peter's Roman Catholic Congregation vs. Germain*, 104 Ill., 440, the Supreme Court of the State held that the foregoing section of the Act of 1845 was not repealed by the Act of March 8, 1869, providing "for the holding of Roman Catholic churches, cemeteries, and other property," but was displaced by the 42d section of the Act of April 18, 1872 (Chap. 32 of the Revision of 1874), which last section, however, the court said, was substantially the same as the 44th section of the Act of 1845; and to be regarded as, in effect, merely continuing the latter in force.

We have, therefore, to inquire whether the devise in question is void under the Act of April 18, 1872. That act makes provision for the formation of corporations for any

lawful purpose, except banking, insurance, real estate brokerage, the business of loaning money, and the operation of railroads other than horse and dummy railroads. It also makes provision for the incorporation of societies, corporations,and associations, for any lawful purpose, not for pecuniary profit, " capable of taking, purchasing, holding, and disposing of real and personal estate for purposes of their organization."—Secs. 29, 31.

The act proceeds:

"Sec. 35. The foregoing provisions shall not apply to any religious corporation; but any church, congregation, or society formed for the purpose of religious worship, may become incorporated in the manner following, to wit: . . .

"Sec. 41. Upon the incorporation of any congregation, church, or society, all real and personal property held by any person or trustees for the use of the members thereof, shall immediately vest in such corporation and be subject to its control, and may be used, mortgaged, sold, and conveyed the same as if it had been conveyed to such corporation by deed; but no such conveyance or mortgage shall be made so as to affect or destroy the intent or effect of any grant, devise, or donation that may be made to such person or trustee for the use of such congregation, church, or society.

"Sec. 42. Any corporation that may be formed for religious purposes under this act, or under any law of this State for the incorporation of religious societies, may receive by gift, devise or purchase, land not exceeding in quantity (including that already held by such corporation) ten acres, and may erect or build thereon such houses, buildings, or other improvements as it may deem necessary for the convenience and comfort of such congregation, church, or society, and may lay out and maintain thereon a burying-ground; but no such property shall be used except in the manner expressed in the gift, grant, or devise, or, if no use or trust is so expressed, except for the benefit of the congregation, church, or society for which it was intended."

The 45th section permits any congregation, church, or society incorporated under that act, to receive by grant, devise, or bequest, real estate, not exceeding forty acres, for the purpose of holding camp-meetings.—Rev. Stat. 1874, pp. 292, 293.

Assuming for the purposes of this case only, that a church, congregation, or society formed under the laws of another State, for purposes of religious worship in that State, could not lawfully receive by gift, devise, or purchase, land in Illinois, in excess of the quantity which may be received in either of those modes by a similar corporation formed under the laws of Illinois, we are satisfied that the sections last quoted from the Act of 1872 do not embrace corporations of the class to which these Boards of Foreign and Home Missions belong. The Board of Foreign Missions of the Presbyterian Church in the United States of America was formed "for the purpose of establishing and conducting Christian missions among the unevangelized or pagan nations, and the general diffusion of Christianity." Its power to hold real or personal estate in New York is restricted to such quantity as will produce an annual income not exceeding $20,000. The object of the Board of Home Missions of that church is "to assist in sustaining the preaching of the gospel in feeble churches and congregations in connection with the Presbyterian Church in the United States, and generally to superintend the whole of home missions in behalf of such church as the General Assembly shall, from time to time, direct; and also to receive, take charge of, and disburse all property and funds which, at any time, and from time to time, may be intrusted to said church or said board for home missionary purposes." It cannot take and hold real or personal property, the annual income of which shall exceed $200,000.

While these boards are important agencies in aid of the general religious work of the Presbyterian Church in the United States of America, neither of them is, in any proper sense, or in the meaning of the 35th section of the

Act of 1872, a church, congregation, or society formed for the purpose of *religious worship.* The counsel for the plaintiff in error seemed to lay stress upon the more general words "formed for religious purposes," in the 42d section of the Act; but manifestly the other parts of the same section, and previous sections, show that the only corporations intended to be restricted in the ownership of land to ten acres, were those formed for the purpose of "religious worship," and not to organizations commonly called benevolent or missionary societies. The reasons of public policy which restrict societies, formed for the purpose of religious worship, in their ownership of real estate, do not apply at all, or, if at all, only with diminished force, to corporations which have no ecclesiastical control of those engaged in religious worship, and cannot prescribe the forms of such worship, nor subject to ecclesiastical discipline those who fail to conform to the rules, usages, or orders of the religious society of which they are members.

This conclusion does not, in the slightest degree, conflict with the decision in *St. Peter's Roman Catholic Congregation vs. Germain.* That was a case of a conveyance of about eighty acres of land directly to a congregation or society "formed for the purpose of religious worship," as distinguished from a benevolent or missionary organization. The court held that, under the legislation of Illinois, "a religious corporation is authorized to receive or acquire lands to the extent of ten acres, and not more. Any amount in excess of that is expressly forbidden by statute, and it follows that all conveyances, deeds, or other contracts made in violation of this prohibition, are absolutely void."

As the eleventh clause was intended to pass, and was valid for the purpose of passing, to the Boards of Foreign and Home Missions of the Presbyterian Church in the United States of America, the estate thereby devised, the decree must be affirmed; and it is so ordered.

Affirmed.

The Consistory of The Reformed Dutch Church of Prattsville *vs.* Nicholas Brandow, Executor, etc., and others.

Decided in the Supreme Court, New York, 1867.

Reported in 52 Barbour's Rep., 228.

Appeal from a decree of the Surrogate of Greene County, made upon the final accounting of the respondent, Nicholas Brandow, as executor, etc., of John Brandow, deceased.

It appeared before the Surrogate that, on the 13th day of September, 1855, John Brandow executed his will, by the seventh clause of which he gave and bequeathed to the consistory of the Reformed Dutch Church of Prattsville, Greene County, N. Y., $500, which clause is in the following language:

"I give and bequeath to the consistory of the Reformed Dutch Church of Prattsville, that is, to the ministers, elders, and deacons, and their successors in office, the sum of five hundred dollars, to be held, used, or invested for the benefit and use of the said church, in such manner as they deem best for the interest of the church. If, however, by the laws regulating and governing the said church at the time of my decease, the said sum of five hundred dollars can not be held, used, or invested, by the said consistory independently of other persons acting, or assuming to act as trustees, then this bequest to be void and of no effect, and the said sum of five hundred dollars is to be disposed of in the same manner as the residue of my personal estate herein mentioned."

The eighth clause of the will directed and required the testator's son, Lucas E. Brandow, to pay to his executors the said sum of five hundred dollars, and when received by them as executors, required them to pay it over to the consistory.

The will of John Brandow was duly admitted to probate by the Surrogate of Greene County, April 7, 1859.

The Reformed Dutch Church of Prattsville was first organized and incorporated June 15, 1802, under the name of the Low Dutch Church of Schohariekill and Blenheim,

and was reorganized and incorporated October 31, 1820, under the name of the " Ministers, Elders, and Deacons of the Reformed Dutch Church in Windham, at the Schohariekill, in the county of Greene." And was again reorganized and incorporated December 10, 1835, pursuant to the provisions of the Act of April 15, 1835, under the name of the Reformed Dutch Church of Prattsville. It appeared that there had been an acting board of trustees for the church from 1835 to the present time, and that there had also been an acting consistory from the first organization of the church to the present time, composed of the ministers, elders, and deacons, but from November 18, 1850, to October 15, 1859, there is no record of any election of elders and deacons in the consistory books. It also appeared that the Reformed Dutch Church of Prattsville is the corporation referred to in the will, and that it is legally incorporated under the laws of the State, with all the powers and privileges belonging to religious corporations.

The Surrogate held that the bequest of five hundred dollars was void and of no effect, under the provisions of the will, and that neither the consistory nor the church were entitled to the bequest; and made a decree accordingly and for the distribution of the balance in the executors' hands among the residuary legatees. The consistory appealed from the Surrogate's decree to the general term of the Supreme Court.

By the Court, Miller, J.—The testator clearly intended, by the seventh clause of his last will and testament, that the Reformed Dutch Church of Prattsville should have the benefit of the bequest made by him to the consistory, provided the consistory could control the bequest. The question then arises, whether this can be done by a disposition of his benefaction by and through the hands of the consistory of the church. I am inclined to think that it can be lawfully and properly disposed of by these officers, and will proceed to state the reasons which have brought my mind to this conclusion.

The Reformed Dutch Church of Prattsville was organized in 1802, and the consistory was contemporaneous with its organization. In 1835, under the Act of April 15, of that year, a board of trustees was elected, and from that time the church appears to have had two sets of officers. There is a distinction between the powers of these two classes of officers, and their duties are not entirely of the same character. By Section 4, of Chapter 90, Session Laws of 1835, an act for the incorporation of religious societies, after trustees are elected and have met and organized, as contemplated by the Act, the right and power of administering, enjoying, and disposing of the temporalities of the church is transferred from the consistory to the trustees, "except the fund raised or to be raised by charitable contributions in said church for the benefit of the poor thereof, commonly called the deacons' fund." The right to disburse the fund raised by charitable contributions is thus retained in the hands and under the control of the consistory, by express enactment, and with this fund the trustees have nothing whatever to do. By Chapter 1, Article 3, Section 2 of the constitution of the Reformed Dutch Church, it is provided that the office of the deacons is "diligently to collect alms and other moneys appropriated for the use of the poor, and with the advice and consent of the consistory, cheerfully and faithfully to distribute the same to strangers as well as those of their own household, etc.", and "should more be collected than the necessities of the poor may require, such surplus may, with the consent of the consistory, be devoted to other purposes connected with the wants of the church." Under this provision of the constitution, the consistory had the power to supervise the disposition of the poor fund, and, with their consent, any surplus might be disposed of, for the advancement of other objects connected with the church, besides those for which the fund was originally bestowed. They had a perfect right to exercise entire control over all the moneys belonging to the church, which had been contributed for

charitable purposes, and this control was independent of the board of trustees. The power of the trustees was restricted to the temporalities, and embraced those matters which related to the ordinary business of the church, but did not extend to the funds contributed for charitable purposes. In reference to these funds, I think the consistory constituted a separate and independent body, having unlimited control; who could sue and be sued or do any lawful act or thing which was essential to carry out the objects for which the funds were designed.

Having briefly stated the relative positions of these two bodies, it is important to examine the character of the bequest, in order to determine whether it is a valid one, and whether its distribution can be lawfully made by the consistory. I think that they were a body who were authorized to take by bequest; and that a bequest to them was a gift to competent trustees, who had power and authority to execute the trust, and to dispose of the fund in accordance with the decisions of the highest tribunal of this State. *(Beekman vs. Bonsor, 23 N. Y. Rep., 310; Williams vs. Williams, 4 Seld., 525; Bascom vs. Albertson, 34 N. Y. Rep. 584.)*

A bequest to the consistory was in effect a bequest to the church corporation itself, and was not the less so because it was devised to these officers. *(New York Inst. for Blind vs. How's Ex'rs, 6 Seld., 84-92; and cases cited.)* I discover no reason why the bequest was not a valid one, provided it came within the limits of their authority to dispose of it. By the will of the testator, the legacy was for the benefit and use of the church, in such manner as the consistory deemed best for the interest of the church. I think that the consistory had ample power to dispense this sum for charitable purposes, and such purposes would be for the use and benefit of the church. To some extent, at least, it would save the necessity of other contributions for that object, and those donations which were thus intended might be appropriated for other purposes, and thus a benefit be conferred upon the church.

If more funds were realized in this direction than was absolutely required, the consistory, by virtue of section 2 of article 3 of the constitution before cited, would be authorized to appropriate them for other objects, which would be of advantage to the church, as had been its custom previously, and as would seem, might perhaps be necessary to prevent an undue accumulation of this particular fund in their hands. The constitution was in force when the Act of 1835 was passed, and the statute, in making an exception in favor of the fund raised for charitable contributions, must be considered in reference to the constitution as it then was, and as reserving all the rights and powers which then existed, as to the fund in question. The statute does not limit in any way the application of this fund for any specific purpose, and must be regarded, I think, as not intended to restrict its appropriation to any purpose different from what was sanctioned by the constitution of the church. The discretionary power vested in the consistory, which conferred upon them a right to dispose of the fund as they might deem best for the interest of the church, must be construed to mean, and such, no doubt, was the intention of the testator, " as they deem best " within the scope of the authority and powers conferred upon them by the constitution of the church and the statute referred to.

It is said that the legacy is not a charitable contribution *to the church.* It is certainly a contribution for the benefit of the church, and as it is bequeathed directly to the consistory, and they have the power to dispense charity, for the benefit of the poor, I think it may be considered as a portion of the fund which they are authorized to hold and dispose of. They had a right to appropriate it for the benefit of the poor, if they deemed that proper and advantageous. And so long as it was bequeathed to them and they had the power, under certain contingencies, to appropriate it for other purposes, it does not, I think, impair its validity because the testator did not specifically limit the application of the bequest.

It is further urged that it was not raised by contributions "in the church," as it was donated outside of it. I scarcely think that the statute was intended to embrace only such donations as should be made within the walls of the church edifice itself, and to exclude all which should be bestowed outside of the building. Such an interpretation would be narrow and restricted, and would exclude any contribution from an individual who was not actually present, and who preferred to dispense his charity to some of the officers, while not there. Such clearly could not have been the intention of the statute.

A point is pressed upon our attention to the effect that the executor cannot be decreed to pay the legacy to the church unless he can collect the amount from the estate of Lucas E. Brandow, who was to pay it to the executors, under the eighth clause of the will. No such point appears to have been taken before the Surrogate, and it is not discussed in his opinion. In fact, he considers the simple question whether the consistory, or the residuary legatees, are entitled to the legacy. It also appears from the return to the appeal that sufficient assets of the estate properly applicable to the legacy had come to the hands of the executors, if the consistory were entitled to receive it. Upon these conceded facts, it is evident that the objection is not a valid one.

It is also insisted that there was no election of a consistory for several years prior to the proof of the will in 1859, and, there being no consistory in existence when the will took effect, the bequest was invalid. Although the record of the church does not show any election of a consistory between November, 1850, and October, 1859, there was positive proof before the Surrogate that for a period of thirty-two years, embracing the time above stated, there had been an acting consistory, composed of the minister, elders, and deacons. Even if no election had been had, which is not to be regarded as established, as the evidence stands, the trustees and officers of a religious corporation hold over until others are chosen in their places.

(The People vs. Runkle, 9 John., 147; 10 Modern, 1046.) But the question can not be raised collaterally, upon this appeal. It can only be presented by a direct proceeding for that purpose. There was a consistory *de facto* at the time of the testator's death, and, being such by color of office, their proceedings are valid until they are ousted by a judgment at the suit of the people. *(See 9 John, 147; Trustees of Vernon Society vs. Hillis, 6 Cowan, 23; Slee vs. Bloom, 5 John, 375.)*

As the Surrogate erred in adjudging that the legacy of the appellants was void, the proceedings before him must be reversed. The questions involved are difficult and intricate, and I therefore think that the costs of this appeal should be paid out of the estate.

Decree of the Surrogate reversed, as to the disallowance of the leagcy, and so modified as to direct the payment of such legacy, with interest, and the costs of both parties on the appeal, out of the estate.

[Albany General Term, September 16, 1867. Miller, Hogeboom, and Ingalls, Justices.]

Chester Powers *et al.*, Appellants, *vs.* Ernest Budy *et al.*, Appellees.

The Supreme Court of Nebraska,

January, 1895.

Reported in 45 Nebraska Reports, 208.

Appeal from the district court of Adams County.

Ryan, C.—The appellants as plaintiffs were denied the relief by them prayed in the district court of Adams County. The allegations of their petition pertinent to our review of the decree complained of on appeal were that Shilo Church at Keneshaw, in the aforesaid county, was an organization created under the laws of Nebraska in conformity with the rules and government of the Evangelical Association of North America; that said Shilo Church had acquired two certain tracts of real property, on one of which was a church building, and the other was used as a parsonage; that one of the plaintiffs, Conrad Schwab, at the time of the filing of the petition, and long before, was, and had been, an ordained minister in said Evangelical Association, and a member of the Platte River Conference; and that at the annual conference of the Platte River Conference District in 1892, presided over by S. C. Breyfogle, an acting bishop in said association, the aforesaid Conrad Schwab was duly elected and thereupon was duly assigned to preach and preside over said Shilo Church. It was charged in the petition that, notwithstanding the facts stated, the defendants wrongfully refused to recognize the pastoral authority of the Rev. Conrad Schwab, and unless restrained would eject him from the aforesaid church property. While this language would imply that the Rev. Conrad Schwab was in the possession of said church property, this is rendered, perhaps, more than doubtful by the following averments found in the petition, to wit: "Plaintiffs state that the defendants were at one time members of the said Evangelical Association, but that they are now in a state of rebellion against the same, against the officers thereof, and refused to be governed by the laws of the said Evangelical Association, as

set forth in the description thereof; that they refuse to recognize any of the acts of the annual conference herein mentioned; refuse to accept the minister thereat assigned, and without any right whatever have placed in the pulpit of said church the defendant, Samuel H. Dinkleburger, who is also in a state of rebellion against the said association, its officers, and members, who has no right whatever to preach in said church, or preside over the congregation of said association thereat." Following the above language the averments of the petition were, in effect, that the defendants were seeking to obtain possession of the parsonage building and eject the Rev. Conrad Schwab therefrom; that the defendants, with all their power, were trying to destroy the Evangelical Association, teaching doctrines and ideas contrary thereto—inciting to rebellion against said association and authority certain of its members, and to accomplish said purposes were using the property of Shilo Church and diverting said property from its proper uses. The prayer of the petition was for an injunction " restraining the defendants from doing, causing to be done, or in any manner counselling others to do, each and every of the wrongs herein complained of," and for general equitable relief. The defendants, with zeal equal to that displayed by plaintiffs, answered to the extent of twenty-one pages of typewritten matter, supplemented with eleven like pages of exhibits. In this answer it was asserted that neither of plaintiffs was a member of Shilo Church aforesaid; that Conrad Schwab had never been a legally appointed, empowered, or qualified minister of the church described in the petition, and had never been appointed by any legal or other conference. It is quite unnecessary to further summarize the contents of the answer, for already it appears that this contest was as to the right of Mr. Schwab as against Mr. Dinkleburger to officiate as pastor of Shilo Church. The rival claims of right in this respect are traceable to the dispute which arose in the Evangelical Association of North America concerning the alleged suspension of Bishop Esher by a

committee which, over his protest, assumed and exercised jurisdiction, as is claimed, with the result indicated. Previous to the above final action by the committee, Bishop Esher came to Beaver Crossing, Nebraska, and by virtue of his office of bishop attempted to preside over the annual meeting of the Platte River Conference at that place. This body refused to recognize him as its president, because there then existed charges against him, and, under the provisions of the discipline of the Evangelical Association applicable in cases where no bishop was present, there elected an elder, who thereupon, with the assent of all present, except Bishop Esher and perhaps one other person, assumed to act as president of this conference, which, among other acts, designated Holdredge as the place of its meeting in 1891. At the meeting held in Holdredge pursuant to above designation, Glenville was selected as the place at which the Platte River Annual Conference should be held in 1892. At this conference at Glenville, Rev. S. H. Dinkleburger was assigned to preach and preside over the congregation at Shilo, and the performance of the duties devolved upon him by this association were those which plaintiffs sought by this action to prevent by injunction. When an elder had been elected president at the annual conference at Beaver Crossing on the assumption that no bishop was present, Bishop Esher protested, and, finding that he was not heeded, withdrew, after denouncing the proceedings as without warrant. In the *Evangelical Messenger*, a journal purporting to be the organ of the above-described Evangelical Association, of date February 24, 1891, J. J. Esher, without any official designation, called a meeting of the Platte River Conference, for reorganization and for its annual session, to be held at Omaha March 6, 1891. At the meeting thus called Nelson was fixed upon as the place of the annual meeting of the Platte River Conference in the year 1892. It was by this latter convocation that Rev. Conrad Schwab was appointed preacher of said Shilo Church, and between this appointee and Rev. S. H. Dinkleburger

trouble at once began, and, though the term of appointment expired in March, 1893, the contest survives in this appeal.

By the pleadings there were presented for determination, *in limine*, the questions whether or not either appointee was a member of the general society known as the Evangelical Association of North America, and whether or not either of the parties litigant were connected therewith, or were seceders from and in rebellion against it. If these propositions should be settled in such a manner as to permit of further litigation, the next question presented would be whether or not J. J. Esher was a bishop when the Platte River Annual Conference was held at Beaver Crossing, and if so, what was the effect of the irregularities which in such case must be conceded to have characterized subsequent proceedings. These are questions which must be determined by the proper authorities of the association. While they are insisted upon in this appeal, they are in fact merely incidental to the principal, and probably the only, question which we are asked to decide, and that is, who was the proper preacher to have charge of and preside over Shilo Church between a certain day of March, 1892, and a corresponding day in March, 1893?

In *Parmelee vs. Ashe (44 Neb., 672)* an opinion has been filed during this term in which it was held that so long as there is no infringement of the rights of a citizen and there is no conflict with the jurisdiction of the State, church associations should be free from the interference of courts where there is drawn in question only the right of such organizations to try and, if need be, to expel its members for the violation of a church ordinance or law. It is quite possible that for the final determination of the unhappy controversy, to which this is a mere incident, there exists in the regulations of the Evangelical Association of North America no sufficient provision. This, if it exists, is a deficiency which can be supplied only by the association. Courts of equity, while they may supply

remedies not available in legal actions, have no jurisdiction to supplement the powers of purely voluntary associations when, through improvidence, they in practice are found inadequate. To concede that voluntary associations can not govern themselves might present a convincing argument against allowing them to at all exist, but by no means affords a justification for placing them under the guardianship of the State through its courts. The separation of Church and State can not be too thoroughly insisted upon, and the contingency which would justify control by the latter of the affairs of the former is scarcely, if at all, imaginable. The necessity for this independence, as well as its actual existence, have been universally recognized and frequently enforced by the civil tribunals of this country.—(*Connitt vs. Reformed Protestant Dutch Church*, 4 *Lans.* [*N. Y.*] 339. *White Lick Quarterly Meeting of Friends vs. White Lick Quarterly Meeting of Friends*, 89 *Ind.*, 136; *Shannon vs. Frost*, 3 *B. Mon.* [*Ky.*], 253; *Gaff vs. Greer*, 88 *Ind.*, 122; *Chase vs. Cheney*, 58 *Ill.*, 509; *State vs. Faeris*, 45 *Md.*, 183; *Watson vs. Jones*, 13 *Wall* [*U. S.*], 679; *Pramdee vs. Ashe*, 44 *Neb.*, 672.)

The decree appealed from, which dissolved the injunction obtained by plaintiffs and denied the relief prayed, was justified by the views expressed, and the judgment of the district court is therefore

Affirmed.

William A. Smith and others *vs.* Leroy Swormstedt and others.

The Supreme Court of the United States, December, 1853.

Reported in 16 Howard U. S. Reports, 288.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the District of Ohio.

The bill is filed by the complainants, for themselves, and in behalf of the traveling and worn-out preachers in connection with the society of the Methodist Episcopal Church South in the United States, against the defendants, to recover their share of a fund called the Book Concern, at the city of Cincinnati, consisting of houses, machinery, printing-presses, bookbindery, books, etc., claimed to be of the value of some two hundred thousand dollars. . . .

There is no material controversy between the parties, as it respects the facts. The main difference lies in the interpretation and effect to be given to the acts and proceedings of these several bodies and authorities of the church. One opinion will be founded almost wholly upon facts alleged in the bill, and admitted in the answer. . . .

The Book Concern, the property in question, is a part of a fund which had its origin at a very early day, from the voluntary contributions of the traveling preachers in the connection of the Methodist Episcopal Church. The establishment was at first small; but at present, is one of very large capital, and of extensive operations, producing great profits. In 1796, the traveling preachers, in General Conference assembled, determined that these profits should be thereafter devoted to the relief of the traveling preachers, and their families; and accordingly resolved that the produce of the sale of the books, after the debts were paid, and sufficient capital provided for carrying on the business, should be applied for the relief of distressed traveling preachers, for the families of traveling preach-

ers, and for supernumerary and worn-out preachers, and the widows and orphans of preachers.

The establishment was placed under the care and superintendence of the General Conference, the highest authority in the church, which was composed of the traveling preachers; and it has grown up to its present magnitude, its capital amounting to nearly a million of dollars, from the economy and skill with which the concern has been managed, and from the labors and fidelity of the traveling preachers, who have always had the charge of the circulation and sale of the books in the Methodist connection throughout the United States, accounting to the proper authorities for the proceeds. The agents who have the immediate charge of the establishment make up a yearly account of the profits, and transmit the same to the several annual conferences, each an amount in proportion to the number of traveling preachers, their widows and orphans comprehended within it, which bodies distribute the fund to the beneficiaries individually, agreeably to the design of the original founders. These several annual conferences are composed of the traveling preachers residing or located within certain districts assigned to them; and comprehended in the aggregate, the entire body in connection with the Methodist Episcopal Church. The fund has been thus faithfully administered since its foundation down to 1846, when the portion belonging to the complainants in this suit, and those they represent, was withheld, embracing some thirteen of the annual conferences.

In the year 1844 the traveling preachers in General Conference assembled, for causes which it is not important particularly to refer to, agreed upon a plan for a division of the Methodist Episcopal Church, in case the annual conferences in the slave-holding States should deem it necessary; and to the erection of two separate and distinct ecclesiastical organizations. And, according to this plan, it was agreed that all the societies, stations, and conferences adhering to the church South, by a majority

of their respective members, should remain under the pastoral care of that church; and all of these several bodies adhering, by a majority of their members, to the Church North, should remain under the pastoral care of that church; and further, that the ministers, local and traveling, should, as they might prefer, attach themselves, without blame, to the church North or South. It was also agreed that the common property of the church, including this Book Concern, that belonged specially to the body of traveling preachers, should, in case the separation took place, be divided between the two churches in proportion to the number of traveling preachers falling within the respective divisions. This was in 1844. In the following year the Southern annual conferences met in convention, in pursuance of the plan of separation, and determined upon a division, and resolved that the annual conferences should be constituted into a separate ecclesiastical connection, and based upon the discipline of the Methodist Episcopal Church, comprehending the doctrines and entire moral, ecclesiastical, and economical rules and regulations of said discipline, except only so far as verbal alterations might be necessary; and to be known by the name of the Methodist Episcopal Church South.

The division of the church, as originally constitued, thus became complete; and from this time two separate and distinct organizations have taken the place of the one previously existing.

The Methodist Episcopal Church having been thus divided, with the authority and according to the plan of the General Conference, it is claimed, on the part of the complainants, who represent the traveling preachers in the church South, that they are entitled to their share of the capital stock and profits of this Book Concern; and that the withholding of it from them is a violation of the fundamental law prescribed by the founders, and consequently of the trust upon which it was placed in the hands of the defendants.

The principle answer set up to this claim is, that, ac-

cording to the original constitution and appropriation of the fund, the beneficiaries must be traveling preachers, or the widows and orphans of traveling preachers, in connection with the Methodist Episcopal Church, as organized and established in the United States at the time of the foundation of the fund; and that, as the complainants, and those they represent, are not shown to be traveling preachers in that connection, but traveling preachers in connection with a different ecclesiastical organization, they have forfeited their right, and are no longer within the description of its beneficiaries.

This argument, we apprehend, if it proves anything, proves too much; for if sound, the necessary consequence is that the beneficiaries connected with the church North, as well as South, have forfeited their right to the fund. It can no more be affirmed, either in point of fact or law, that they are traveling preachers in connection with the Methodist Church as originally constituted, since the division, than those in connection with the church South. Their organization covers but about half of the territory embraced within that of the former church; and includes within it but a little over two-thirds of the traveling preachers. Their General Conference is not the General Conference of the old church, nor dos it represent the interest or possess territorially the authority of the same; nor are they the body under whose care this fund was placed by its founders. It may be admitted that, within the restricted limits, the organization and authority are the same as the former church. But the same is equally true of the organization of the church South.

Assuming, therefore, that this argument is well founded, the consequence is that all the beneficiaries of the fund, whether in the Southern or Northern division, are deprived of any right to a distribution, not being in a condition to bring themselves within the description of persons for whose benefit it was established; in which event the foundation of the fund would become broken up, and the capital revert to the original proprietors, a

result that would differ very little in its effect from that sought to be produced by the complainants in their bill.

It is insisted, however, that the General Conference of 1844 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division, and hence, that the organization of the church South was without authority, and the traveling preachers within it separated from an ecclesiastical connection which is essential to enable them to participate as beneficiaries. Even if this were admitted, we do not perceive that it would change the relative position and rights of the traveling preachers within the divisions North and South, from that which we have just endeavored to explain. If the division under the direction of the General Conference has been made without the proper authority, and for that reason the traveling preachers within the Southern division are wrongfully separated from their connection with the church, and merely have lost the character of beneficiaries, those within the Northern division are equally wrongfully separated from that connection, as both divisions have been brought into existence by the same authority. The same consequence would follow, in respect to them, that is imputable to the traveling preachers in the other division, and hence each would be obliged to fall back upon their rights as original proprietors of the fund.

But we do not agree that this division was made without the proper authority. On the contrary, we entertain no doubt but that the General Conference of 1844 was competent to make it; and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one.

In 1784, when this church was first established, and

down till 1808, the General Conference was composed of all the traveling preachers in that connection. This body of preachers founded it by organizing its government, ecclesiastical and temporal, established its doctrines and discipline, appointed its superintendents or bishops, its ministers and preachers, and other subordinate authorities, to administer its polity and promulgate its doctrines and teachings throughout the land.

It can not therefore be denied, indeed, it has scarcely been denied that this body, while composed of all the traveling preachers, possessed the power to divide it and authorize the organization and establishment of the two separate, independent churches. The power must necessarily be regarded as inherent in the General Conference. As they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one, so they might, at any subsequent period, the power remaining unchanged.

But, it is insisted, that this power has been taken away or given up, by the action of the General Conference of 1808. In that year the constitution of this body was changed so as to be composed, thereafter, by traveling preachers, to be elected by the annual conferences, in the ratio of one for every five members. This has been altered from time to time, so that, in 1844, the representation was one for every twenty-one members. At the time of this change, and as part of it, certain limitations were imposed upon the powers of this General Conference, called the six restrictive articles: 1. That they should not alter or change the articles of religion, or establish any new standard of doctrine. 2. Nor allow of more than one representative for every fourteen members of the annual conferences, nor less than one for every thirty. 3. Nor alter the government so as to do away with episcopacy, or destroy the plan of itinerant superintendencies. 4. Nor change the rules of the united societies. 5. Nor deprive the ministers or preachers of trial by a committee, and of

appeal; nor members before the society or lay committee, and appeal. And 6. Nor appropriate the proceeds of the Book Concern, nor the charter-fund, to any purpose other than for the benefit of the traveling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children. Subject to these restrictions, the delegated conference possessed the same powers as when composed of the entire body of preachers. And it will be seen that these relate only to the doctrine of the church, its representation in the General Conference, the episcopacy, discipline of its preachers, and members, the Book Concern, and charter-fund. In all other respects, and in everything else that concerns the welfare of the church, the General Conference represents the sovereign power the same as before. This is the view taken by the General Conference itself, as exemplified by the usage and practice of that body. In 1820 they set off to the British Conference of Wesleyan Methodists the several circuits and societies in Lower Canada. And in 1828 they separated the Annual Conference of Upper Canada from their jurisdiction, and erected the same into a distinct and independent body. These instances, together with the present division, in 1844, furnish evidence of the opinions of the eminent and experienced men of this church in those several conferences, of the power claimed, which, if the question was otherwise doubtful, should be regarded as decisive in favor of it. We will add, that all the Northern bishops, five in number, in council in July, 1845, acting upon the plan of separation, regarded it as of binding obligation, and conformed their action accordingly.

It has also been urged on the part of the defendants that the division of the church, according to the plan of separation, was made to depend not only upon the determination of the Southern annual conferences, but also upon the consent of the annual conferences North, as well as South, to a change of the sixth restrictive article, and as this was refused, the division which took place was unauthorized. But this is a misapprehension. The change

of this article was not made a condition of the division. That depended alone upon the decision of the Southern conferences.

The division of the Methodist Episcopal Church having thus taken place, in pursuance of the proper authority, it carried with it, as a matter of law, a division of the common property belonging to the ecclesiastical organization, and especially of the property in this Book Concern, inasmuch as the division of the association was effected under the authority of a body of preachers who were themselves the proprietors and founders of the fund.

It has been argued, however, that, according to the plan of separation, the division of the property in this Book Concern was made to depend upon the vote of the annual conferences to change the sixth restrictive article, and that whatever might be the legal effect of the division of the church upon the common property otherwise, this stipulation controls it and prevents a division until the consent is obtained.

We do not so understand the plan of separation. It admits the right of the church South to its share of the common property, in case of a separation, and provides for a partition of it among the two divisions, upon just and equitable principles; but, regarding the sixth restrictive article as a limitation upon the power of the General Conference, as it respected a division of the property in the Book Concern, provision is made to obtain a removal of it. The removal of this limitation is not a condition to the right of the church South to its share of the property, but is a step taken in order to enable the General Conference to complete the partition of the property.

We will simply add, that as a division of the common property followed, as matter of law, a division of the church organization, nothing short of an agreement or stipulation of the church South to give up their share of it, could preclude the assertion of their right; and, it is quite clear, no such agreement or stipulation is to be

found in the plan of separation. The contrary intent is manifest from a perusal of it.

Without pursuing the case further, our conclusion is, that the complainants and those they represent, are entitled to their share of the property in this Book Concern. And the proper decree will be entered to carry this decision into effect. . . .

The People *ex rel.* James B. Peck, Respondent, *vs.* Francis M. Conley and Others, Trustees of the First Society of the Methodist Episcopal Church of the Town of Cohocton, Appellants.

The Supreme Court of the State of New York, October, 1886.

Reported in 42 Hun, 98.

Barker, J.—The relator is a minister of the gospel, in good standing, of the religious denomination and organization known as the Methodist Episcopal Church. The appellants are the trustees of the First Society of the Methodist Episcopal Church of the town of Cohocton, organized in the year 1829, under the general law of 1813 (Chap. 60), permitting the creation of religious corporations. This corporation is located within the territorial limits of the Genesee Conference of the said denomination, over which Bishop Hurst presided at the annual conference held in the year 1885. In the year 1831 the local society received a conveyance of a parcel of land, upon which a meeting-house has since been erected, and the grantees therein are mentioned and described as " Paul C. Cook and four others, trustees of the First Methodist Episcopal Society of the town of Cohocton, and their successors in office, of the second part." No conditions are inserted in this conveyance upon which the title vested in the trustees is made to depend; nor is any reference made therein as to the religious organization to which the said corporation belongs, other than is found in the clause describing the official character of the trustees.

By the custom, regulations, and discipline of the Methodist Episcopal Church, the bishop presiding at an annual conference possesses full authority, and is charged with the duty to make the appointment of preachers for the several local districts within his conference. At the conference held in 1885, Bishop Hurst, in due form, appointed the relator as the preacher to be located in the Cohocton district, and to occupy for religious purposes the meeting-house owned by the corporation of which the appellants

are the trustees. They refuse to receive the relator in his capacity as preacher, and refuse to open the meeting-house, that he may conduct religious services therein, in accordance with the rights, ceremonies, and discipline of the Methodist Episcopal Church, to which the local society and corporators were attached. The trustees were supported in their action in this respect by a majority of the congregation and communicants belonging to the local society. The trustees justify their action, morally and as members of the religious society, upon the ground that they were dissatisfied, as a body, with the action of the conference and the bishop in appointing the relator as the preacher of their society, and specify as the chief reason of their opposition that the relator is entirely incompetent to perform the duties of pastor, and without talent to edify and instruct the people.

As a legal justification, and for the purpose of defeating the relator's application, they claim that the corporation of which they are the trustees is a civil one, independent of all ecclesiastical judicatories, and that the civil courts are without jurisdiction to guide or control their action in the management of the temporalities of the church, over which they have the same control that the trustees or directors of business corporations have and possess, by the general laws of the State. In this contention they would have been supported by the construction which the courts have placed upon the general act of 1813, prior to its amendment by Chapter 79 of the Laws of 1875, and Chapter 176 of the Laws of 1876.—(*Robertson vs. Bullions*, 11 *N. Y.*, 243; *Petty vs. Tooker*, 212*d*, 267.)

In these cases it was held that the members of the society or corporation form the corporate body, such members being the corporation, and the trustees the mere officers of the corporation; that the body or entity thus brought into existence is a civil corporation, with such functions and powers as the statute confers upon it and its officers, and that in no sense was it an ecclesiastical corporation; that it was wholly independent, in its ex-

istence and in the control and management of its affairs, of all religious judicatories; that it is a creature of the State, and subject to such control as its own laws may impose; that none of the provisions of the Act of 1813 were intended to disturb, interfere with, or regulate the actions and powers of the numerous voluntary religious organizations existing in this State, and that such powers were recognized and considered as entirely spiritual associations, distinct and separate from the body politic.

Since these decisions were made, giving a construction to the original act, supplemental provisions have been enacted which provide that the rectors, wardens, and vestrymen, or the trustees, consistory or sessions of any church, congregation, or religious society, incorporated under any of the laws of this State, shall administer the temporalities thereof, and hold and apply the estate and property belonging thereto, and the revenues of the same, for the benefit of such corporation, according to the rules and usages of the church or denomination to which the said corporation shall belong; and it shall not be lawful to divert the estate, property, or revenue to any purpose except the support and maintenance of any church or religious or benevolent institution or object connected with the church or denomination to which such corporation shall belong.—(Laws of 1876, Chap. 176, Sec. 1.)

The Legislature had previously enacted (Laws of 1875, Chap. 79) that the jurisdiction of courts of equity was extended over religious corporations, so far as it may be necessary to enforce the provisions of that act, which provided that the trustees of any church, congregation, or religious society, incorporated under Section 3 of the Act of 1813, shall administer the temporalities thereof, and hold and apply the estate and property belonging thereto, and the revenues of the same, for the benefit of such corporation, according to the discipline, rules, and usages of the denomination to which the church members of the corporation belong; nor shall it be lawful for the trustees to divert such estate, property, or revenues to any

other purpose, except toward the support and maintenance of any religious, benevolent, or other institution connected with such church, congregation, or religious society.

This court has, by its previous decisions, placed a construction upon these amendments or supplemental provisions to the original act, and held that the courts, by force of their provisions, have jurisdiction to supervise the action of trustees of religious corporations and require them to use and manage the property according to the rules and usages of the church or denomination to which the corporation belonged; and when they attempt to divert the property of which they have the title as trustees, or to use the revenues which may come to their hands, except for the support and maintenance of the church or denomination to which it is attached, to restrain their action by appropriate orders and decrees in actions or proceedings properly instituted for that purpose by interested parties.

In *Isham vs. Fullager (14 Abb. N. C., 363)*, it was held at Special Term that the trustees could be properly restrained, under the amendatory clauses, from opening the church building to the ministration of a minister who had been deposed from the office by the action of an ecclesiastical judicatory to which he and the society belonged. This case was affirmed at General Term, on the opinion of the justice who presided at Special Term. The same views were again expressed by this court in the case of *The First Reformed Presbyterian Church vs. Bowden (14 Abb. N. C., 356)*. The same questions were up for consideration, and the same conclusions reached in *Isham vs. The Trustees of the First Presbyterian Church of Dunkirk (63 How., 495)*.

In the examination of the case at bar we have re-examined the questions involved in the discussion, and are confirmed in our views as previously expressed, and, upon the authority of the cases cited, we hold that it was the duty of the trustees to receive the relator as the minister

assigned to the district of the First Methodist Episcopal Church of Cohocton, and to open the meeting-house to him for the purpose of conducting divine worship therein, in conformity to the tenets and discipline of the religious denomination to which he belongs and to which the corporation is attached. In refusing to open the meeting-house the trustees violated a plain duty, and the writ of *mandamus* is a proper remedy to put the relator in possession of the pulpit to which he is entitled.—(*People vs. Steele, 2 Barb., 397.)*

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The order and the writ, as amended, are affirmed, without costs of this appeal to either party.

Smith, P. J., and Bradley, J., concurred; Haight, J., not sitting.

Terrett and others *vs.* Taylor and others.
The Supreme Court of the United States,
February, 1815.
Reported in 9 Cranch U. S. Reports, 43.

Story, J., delivered the opinion of the Court, as follows:

. . . At a very early period, the religious establishment of England seems to have been adopted in the colony of Virginia; and, of course, the common law upon that subject, so far as it was applicable to the circumstances of that colony. The local division into parishes for ecclesiastical purposes can be very early traced; and the subsequent laws enacted for religious purposes evidently presuppose the existence of the Episcopal Church, with its general rights and authorities growing out of the common law. What those rights and authorities are need not be minutely stated. It is sufficient that, among other things, the church was capable of receiving endowments of land, and that the minister of the parish was, during his incumbency, seized of the freehold of its inheritable property, as emphatically *persona ecclesiæ*, and capable, as a sole corporation, of transmitting that inheritance to his successors. The church wardens, also, were a corporate body clothed with authority and guardianship over the repairs of the church and its personal property; and the other temporal concerns of the parish were submitted to a vestry composed of persons selected for that purpose. In order more effectually to cherish and support religious institutions and to define the authorities and rights of the Episcopal officers, the Legislature, from time to time, enacted laws on this subject. By the Statutes of 1661, Chaps. 1, 2, 3, 10; and of 1667, Chap. 3, provision was made for the erection and repairs of churches and chapels of ease; for the laying out of glebes and church lands, and the building of a dwelling-house for the minister; for the making of assessments and taxes for these and other parochial purposes; for the appointment of churchwardens to keep the church in repair, and to provide books, ornaments, etc.; and, lastly, for the election of a vestry

of twelve persons by the parishioners, whose duty it was by these and subsequent statutes, among other things, to make and proportion levies and assessments, and to purchase glebes and erect dwelling-houses for the ministers in each respective parish. See Statute of 1696, Chap. 11; of 1727, Chap. 6, and of 1748, Chap. 28.—2; Tucker's Blackst. Com.; Appendix Note M.

By the operation of these statutes and the common law, the lands thus purchased became vested, either directly or beneficially, in the Episcopal Church. The minister for the time being was seized of the freehold, in law or in equity, *jure ecclesiæ*, and, during a vacancy, *the fee remained in abeyance*, and the profits of the parsonage were to be taken by the parish for their own use.—Co. Lyt., 340 b. 341, 342; b. 2 Mass. Rep., 500.

Such were some of the rights and powers of the Episcopal Church at the time of the American Revolution; and under the authority thereof, the purchase of the lands stated in the bill before the Court, was undoubtedly made. And the property so acquired by the church remained unimpaired, notwithstanding the Revolution; for the Statute of 1776, Chap. 2, completely confirmed and established the rights of the church to all its lands and other property.

The Statute of 1784, Chap. 88, proceeded yet further. It expressly made the minister and vestry, and, in case of a vacancy, the vestry of each parish respectively, and their successors forever, a corporation by the name of the Protestant Episcopal church in the parish where they respectively resided, to have, hold, use, and enjoy all the glebes, churches, and chapels, burying-grounds, books, plate, and ornaments appropriated to the use of, and every other thing the property of the late Episcopal church, to the sole use and benefit of the corporation. The same statute also provided for the choice of new vestries, and repealed all former laws relating to vestries and churchwardens, and to the support of the clergy, etc., and dissolved all former vestries; and gave the corpora-

tion extensive powers as to the purchasing, holding, aliening, repairing, and regulating the church property. This statute was repealed by the Statute of 1786, Chap. 12, a proviso saving to all religious societies the property to them respectively belonging, and authorizing them to appoint, from time to time, according to the rules of their sect, trustees who should be capable of managing and applying such property to the religious use of such societies; and the Statute of 1788, Chap. 47, declared that the trustees appointed in the several parishes to take care of and manage the property of the Protestant Episcopal Church, and their successors, should, to all intents and purposes, be considered as the successors to the former vestries, with the same powers of holding and managing all the property formerly vested in them. All these statutes, from that of 1776, Chap. 2, to that of 1788, Chap. 47, and several others, were repealed by the Statute of 1798, Chap. 9, as inconsistent with the principles of the Constitution and of religious freedom; and by the Statute of 1801, Chap. 5 (which was passed after the District of Columbia was finally separated from the States of Maryland and Virginia), the Legislature asserted their right to all the property of the Episcopal churches in the respective parishes of the State; and, among other things, directed and authorized the overseers of the poor, and their successors in each parish wherein any glebe land was vacant, or should become so, to sell the same and appropriate the proceeds to the use of the poor of the parish.

It is under this last statute that the bill charges the defendants (who are overseers of the poor of the parish of Fairfax) with claiming a title to dispose of the land in controversy.

. . . . . .

It is conceded on all sides that, at the Revolution, the Episcopal Church no longer retained its character as an exclusive religious establishment. There can be no doubt that it was competent to the people and to the Legislature

to deprive it of its superiority over other religious sects, and to withhold from it any support by public taxation. But, although it may be true that "religion can be directed only by reason and conviction, not by force or violence," and that "all men are equally entitled to the full exercise of religion according to the dictates of conscience," as the bill of rights of Virginia declares, yet it is difficult to perceive how it follows as a consequence that the Legislature may not enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns. Consistent with the constitution of Virginia, the Legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion can not be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. And that these purposes could be better secured and cherished by corporate powers cannot be doubted by any person who has attended to the difficulties which surround all voluntary associations. While, therefore, the Legislature might exempt the citizens from a compulsory attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations.

Be, however, the general authority of the Legislature as to the subject of religion, as it may, it will require other arguments to establish the position that, at the Revolution, all the public property acquired by the Episcopal churches, under the sanction of the laws, became the property of the State. Had the property thus acquired

been originally granted by the State or the king, there might have been some color (and it would have been but a color) for such an extraordinary pretension. But the property was, in fact and in law, generally purchased by the parishioners, or acquired by the benefactions of pious donors. The title thereto was indefeasibly vested in the churches, or rather in their legal agents. It was not in the power of the crown to seize or assume it: nor of the Parliament itself to destroy the grants, unless by the exercise of a power the most arbitrary, oppressive, and unjust, and endured only because it could not be resisted. It was not forfeited, for the churches had committed no offense. The dissolution of the royal government no more destroyed the right to possess and enjoy this property than it did the right of any other corporation or individual to his or her own property. The dissolution of the form of government did not involve in it a dissolution of civil rights, or an abolition of the common law under which the inheritances of every man in the State were held. The State itself succeded only to the rights of the crown; and, we may add, with many a flower of prerogative struck from its hands. It has been asserted as a principle of the common law that the division of an empire creates no forfeiture of previously vested rights of property. *Kelly vs. Harrison, 2 John, Chap. 29; Jackson vs. Lunn, 3 John, Chap. 109; Colvin's Case, 7, Co, 27.* And this principle is equally consonant with the common-sense of mankind and the maxims of eternal justice. Nor are we able to perceive any sound reason why the church lands escheated or devolved upon the State by the Revolution, any more than the property of any other corporation created by the royal bounty or established by the Legislature. The Revolution might justly take away the public patronage, the exclusive cure of souls, and the compulsive taxation for the support of the church. Beyond these we are not prepared to admit the justice or the authority of the exercise of legislation.

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Samuel Chase *et al. vs.* Charles E. Cheney.

The Supreme Court of Illinois,

1871.

Reported in 58 Illinois Reports, 509.

Mr. Justice Thornton delivered the opinion of the Court:

This is a bill to enjoin the plaintiffs in error, as an ecclesiastical court, from proceeding with the trial of the defendant, for alleged offenses and misconduct, as a presbyter of the diocese of Illinois, and rector of Christ Church, in the city of Chicago.

The injunction was originally granted, without notice; and a motion was then made to dissolve it, which, upon the hearing, on bill, answer, replication, and affidavits, was overruled.

The case is before us by writ of error.

The bill alleges the issuing of a commission, by the bishop of the diocese, appointing three persons as presenters; the finding of the presentment; and a citation, giving notice of the time and place of trial; that the accused, in person, and by counsel, appeared when the court was organized, and preferred objections to the validity of all the papers, which were overruled, and claimed his right of challenge of the persons who were selected to try the issue, which was denied; that the commission, presentment, and citation are void, and give no authority to the assessors; that the accused receives, from his parish, forty-five hundred dollars per annum, and enjoys a rectory, rent free, and has received numerous calls from other parishes, in other dioceses, at much higher salaries; that he has not been guilty of any offense for which he is liable to be tried; yet the bishop is prejudiced against him; has prejudged his case; and is determined to convict and deprive him of his position and its emoluments; that the respondents were selected to condemn; that they sympathize with the bishop, and, with him, belong to the high church party; and that complainant is attached to the low church party in the Protestant Episcopal Church;

and that he and the bishop are diametrically opposed in their views.

There are numerous affidavits filed, which we shall not consider, in the view we take of this case.

The charge of prejudice and combination is denied, by the answers; and the only proof to sustain it, worthy of any consideration, is in the affidavit of the accused.

A stipulation was entered into and made a part of the record, that the printed constitution and canons of the diocese of Illinois, and of the general convention of the Protestant Episcopal Church; the address of the bishop of Illinois to the diocesan convention of 1863, and his answer and letter, in the case of the Rev. E. W. Hagar, should be evidence in the case.

Without asserting the power of this court, in cases of this character, yet, on account of the earnest, and able, and elaborate argument of counsel, we will notice the objection that the spiritual court had no authority to adjudicate on the alleged offense.

The objections are these:

1. The bishop, by a recital in the commission that the information upon which he acted was "credible information," excludes the hypothesis that he exercised the power of appointment, in either of the modes mentioned in Sec. 2 of Canon 20; and that he could only proceed as directed therein.

2. That the presentment was insufficient, in specification of time, place, and circumstance.

3. That eight presbyters did not appear, but only five, at the time and place of trial, when the attempted organization of the court took place; and that the accused was denied his right of challenge.

4. That there was, in fact, no notice given of the trial.

Except one, those objections are extremely technical.

There is in evidence a commission, issued by the bishop, appointing three persons to investigate the charge, and make presentment. Presentment was found, containing these charges and divers specifications, as to offenses com-

mitted while officiating as rector of Christ Church, Chicago. A citation was signed by the bishop, fixing the time and place of trial, which, with a copy of the presentment, was duly served. The citation furnished the names of eight presbyters, from whom the accused might select five others, as assessors; and allowed twelve days in which to make the selection.

Was a commission necessary to confer jurisdiction? Did the court or the accused have any right to call for it? Concede that the bishop did not obtain his information from either of the sources specified in the canon, is the jurisdiction of the court thereby ousted? The canon requires no commission to be issued. By the canon, the appointment need not be in writing. The bishop is compelled to appoint three persons to examine the case, and presentment make. He performs this duty in such manner as he may choose.

If the court had jurisdiction of the subject-matter and the person, it had power to proceed. The subject-matter was contained in the presentment, not in the commission. The person had been summoned and was present. Therefore neither the source, nor the character, of the facts communicated to the bishop, except as contained in the presentment, were proper subjects of inquiry by the church court. The offense charged was the matter to be investigated—the fact to be tried. If the accused had violated the constitution of his church; his engagement to conform to its doctrines and worship; and his ordination vow, as alleged, such violations could not be palliated by the errors of the bishop. If the bishop disregarded the canons, and transcended the limits of his power, as diocesan, he is amenable therefor, and liable to trial, before his brother bishops. His transgression can not excuse the wrongful act of another; can not be pleaded in justification, or to the jurisdiction. The court then, upon presentment made and due service, had power to take cognizance of, and decide the case. . . .

Sustaining as we do, the jurisdiction of the ecclesi-

astical court, we might fairly waive an answer to the suggested defects in the presentment, and rely upon an authority furnished by counsel: *Walker vs. Wainwright, 16 Barb. S. C. R. (N. Y.), 486.* In that case the motion was made by the counsel for Walker, that Wainwright, the bishop, be required to show cause why the injunction previously granted, restraining the sentence, in accordance with the verdict of an ecclesiastical court, should not be made absolute. The learned judge said: "The only cognizance which the court will take of the case, is to inquire whether there is a want of jurisdiction in the defendant, to do the act which is sought to be restrained. I can not consent to review the exercise of any discretion on his part, or inquire whether his judgment, or that of the subordinate ecclesiastical tribunal, can be justified by the truth of the case. I can not draw to myself the duty of revising their action, or of canvassing its manner or foundation, any further than to inquire whether according to the law of the association to which both of the parties belong, they had authority to act at all. In other words, I can inquire only, whether the defendant has the power to act, and not whether he is acting rightly. . . . The refusal of the defendant to issue a commission to take testimony, his refusal to grant a new trial, the alleged misconduct of one of the court, are all matters which relate to the mode of procedure, and not to the right to proceed; and I repeat, that it is the latter alone that I can take cognizance of." The motion was denied, and the injunction dissolved.

If we had the right to determine the sufficiency of the presentment, we should hold, as this court has held in numerous decisions in criminal cases, that it is sufficient, if so plainly drawn that the nature of the offense may be understood. We should not test its correctness by the strict rules of criminal pleading.

The accused was informed by the presentment, that in his own church, in the city of Chicago, he had committed the alleged offenses. The language is explicit as to their

character. The omissions and alterations are plainly set forth. The place is definitely fixed. No particular day is averred. Was this necessary? The offenses charged are mostly omissions. The rule is: "Where the offense consisted of an omission, it is not necessary to allege any time to it."—2 Hank., Chap. 25, Sec. 79. Even in criminal cases, it is not necessary to prove the time precisely, as laid. The particular day is not material in point of proof, and is merely matter of form.—Philip's Ev., Vol. 1, 214. This court has decided that the allegation of the precise time, even in criminal cases, is not essential, unless in a few cases. *Gebhart vs. Adams, 23 Ill., 399.* The presentment avers as to time, "At divers times during the two years last past," and "at divers times during the six months last past." It was insisted in the argument that, as no precise day is named, therefore the accused can not meet the charge, without summoning a large number of witnesses. He would not be aided by the averment of a particular day. If the presentment had charged the commission of the offense on a certain day in the month of June, A. D., 1867, the prosecution would not, by any rule of law, have been limited to the day named, but might have proved the offense —the omission—on any day between the day named and the date of the presentment. The statute of limitations would not apply, for the canon has not so provided. The highest judicature, in this church, has decided that there was no such law governing church trials. Bishop Onderdonk was found guilty of immorality and impurity, committed seven years prior to his trial; and the bishops of Louisiana, Rhode Island, Delaware, and Arkansas, in their opinion, declared that there was no limitation to the inquiry by a church court, as to offenses, because none had been fixed and recognized by the canons.

It is inconceivable that the accused could have been surprised by any vagueness or uncertainty in the charges and specifications. It is a reasonable presumption, that a minister has knowledge of the constitution of his

church, and of his acts as such minister, of a public character, and within a recent period; and particularly his conduct and omissions in the administration of the sacrament of his church. The bill contains a virtual admission of such knowledge. The *gravamen*, in the presentment, is the omission of the words "*regenerate*" and "*regeneration*," in the ministration of the sacrament of baptism. The bill has no positive negation of the omission, but merely avers, "that your orator does not believe himself to have been guilty of offense and misconduct, rendering him liable to trial." The fair construction of this averment is: "I am guilty of the omission, but this is no offense which renders me liable to trial." In his affidavit in support of the bill, the accused said he had informed the bishop, that "he had conscientious scruples in regard to the positive averment of the regeneration of the baptized infant, by virtue of the act of baptism only." He further stated, "but this affient utterly denies, that the omission of the word "regenerate" from some part of the said office for infant baptism, would constitute an offense under the canons, etc." The inference is irresistible that he was informed of the nature and cause of the accusation against him.

The third objection raises the right of challenge, and it is insisted that this right inheres in every citizen; that the common law and common justice give it. This is true, in trials in all courts organized under the constitution and laws of the land. This spiritual court was not thus created. It is the creature of the canons of the church, and by them must be governed, and by them be judged. Why should we force upon this church judicatory our system, without the asking and against its consent?

The canons must control. Section 3 of Canon 20 authorizes the formation of an ecclesiastical tribunal, and directs that the bishop shall furnish a list of eight presbyters, to the accused, and he shall select not less than three nor more than five from this list, who shall constitute the court: but if he neglect or refuse to make a selection, the

standing committee shall select for him. This is the mode adopted, and, by implication, excludes all other modes. Eight persons are presented; three or five might be rejected, without cause, and to this extent a peremptory challenge is allowed.

The minister, in a legal point of view, is a voluntary member of the association to which he belongs. The position is not forced upon him; he seeks it. He accepts it with all its burdens and consequences; with all the rules, and laws, and canons then subsisting, or to be made by competent authority; and can, at pleasure and with impunity, abandon it. If they were merciful and regardful of conscientious scruples, he knew it; if they were arbitrary, illiberal, and attempted to chain the thoughts and consciences, he knew it. They can not, in any event, endanger his life or liberty, impair any of his personal rights, deprive him of property acquired under the laws, or interfere with the free exercise and enjoyment of religious profession and worship, for these are protected by the Constitution and laws. While a member of the association, however, and having a full share in all the benefits resulting therefrom, he should adhere to its discipline, conform to its doctrine and mode of worship, and obey its laws and canons. If reason and conscience will not permit, the connection should be severed. "The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it." *Forbes vs. Eden (infra).*

If we compel this spiritual court to observe the rule of law, as to challenge of jurors, it would be our duty to enforce the observance of all the rules of law, unless of impossible application. With the same propriety it might be urged, that twelve presbyters—the number of a jury—instead of three or five, should form the court. Why not go beyond the roll of the church, and abandon the presbyters, as wholly incompetent? The canon, in the designation of presbyters, as assessors, and the number, is no

more emphatic than in providing the manner of selection. What law shall govern, as to the number of witnesses necessary to establish an offense? Our law only requires one witness; with two exceptions, the scriptural rule requires two. The injunction of St. Paul is: "Against an elder receive not an accusation, but before two or three witnesses." The law, under the old dispensation, was, "One witness shall not rise up against a man for any iniquity, or for any sin; at the mouth of two witnesses or at the mouth of three witnesses shall the matter be established."

We have no right, and, therefore, will not exercise the power, to dictate ecclesiastical law. We do not aspire to become *de facto* heads of the church, and, by construction or otherwise, abrogate its laws and canons. We shall not inquire whether the alleged omission is any offense. This is a question of ecclesiastical cognizance. This is no forum for such adjudication. The church should guard its own fold; enact and construe its own laws; enforce its own discipline; and this will be maintained the boundary between the temporal and spiritual power.

As to the fourth objection, that the notice for trial was insufficient, we have only to say, this comes too late. The party was present and made no pretense that he had not had time to prepare for trial. As an allegation in the bill, it is too frivolous to be considered.

But it is said that the civil rights of the Rev. Mr. Cheney are involved in this controversy; that the office of a clergyman is one of public concern; that he has a *vested* right in it; that the right to preach is in itself property; and that, attached to the office in question, are salary and emoluments. Has the party, in this case, any vested right to the rectorship of Christ Church, and, as a necessary consequence, to the profits and perquisites? No parish can form a part of the diocese of Illinois, unless with the consent of the bishop, and the formation of a constitution, as provided in Canon 8, by which it "accedes to, recognizes, and adopts the constitution, canons, doc-

trines, discipline, and worship of the Protestant Episcopal Church." The minister, having been previously ordained, and pledged conformity to the rules and doctrines of the church, is installed as rector, according to Canon 10, by the production of the proper certificate from the bishop. The vestry is required, by Canon 12, to obtain the amount stipulated for his support, by "the gathering of offering in divine service, or by the procurement and collection of subscriptions, or of pew rents." It would be a mockery of language, to say that the agreement for a salary thus made constituted a vested right, a right which could not be suspended. The salary depended upon the continued performance of the duties of rector. The contract must be construed and enforced, by reference to the canons, which form a part of it. If the minister was suspended or deposed, for any ecclesiastical offense, the payment would cease. The case of the *Dutch Church of Albany vs. Bradford, 8 Cowen, 457*, confirms this view. An action was brought by the minister to recover a portion of his salary. He had been only suspended, and insisted that his salary continued until the dissolution of the connection. In the Court of Errors, on a reversal of the decision of the Supreme Court, it was held that he was not entitled to his salary, between the sentence of suspension and dissolution; and that, as he did not and could not perform his ministerial duties, he could not recover his salary. The record, in the case at bar, discloses no contract which we can construe, except by reference to the canon.

It is also claimed, that there is value in the right to pursue any lawful avocation. Of this we entertain no doubt. We have no doubt either of the absolute right of every citizen, under our Constitution, to teach and preach the gospel, to whomsoever will listen. But in an organized church, with written or printed rules, and established doctrine and mode of worship, the right is qualified. The continuance, power, and emoluments of the position, depend upon the will of the church. The right is contingent and restricted, and, as a thing of value, is very much les-

sened. The sentence of the church judicatory, in a proper case, deprives of the position, and salary and emoluments are gone.

In this unhappy controversy is involved a graver question, and of deeper moment to all Christian men—indeed to all men who believe that Christianity, pure and simple, is the fairest system of morals, the firmest prop to our government, the chiefest reliance in this life and the life to come. Shall we maintain the boundary between Church and State, and let each revolve in its respective sphere, the one undisturbed by the other? All history warns, not to rouse the passion or wake up the fanaticism, which may grapple with the State, in a deathly struggle for supremacy.

Our Constitution provides, that "the free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed." In ecclesiastical law, profession means the act of entering into a religious order. Religious worship consists in the performance of all the external acts, and the observance of all ordinances and ceremonies, which are engaged in with the sole and avowed object of honoring God. The Constitution intends to guarantee, from all interference by the State, not only each man's religious faith, but his membership in the church, and the rites and discipline which might be adopted. The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the State, shall not be justified. Freedom of religious profession and worship can not be maintained if the civil courts trench upon the domain of the church, construe its canons and rules, dictate its discipline, and regulate its trials. The larger portion of the Christian world has always recognized the truth of the declaration, "A church without discipline must become, if not already, a church without religion." It is as much a delusion to confer religious liberty without the right to make and enforce rules and canons, as to create government with no

power to punish offenders. The Constitution guarantees the "free exercise *and* enjoyment." This implies, not alone the practice, "but the possession with satisfaction" —not alone the exercise, but the exercise coupled with enjoyment. This "free exercise and enjoyment" must be, as each man, and each voluntary association of men, may determine. The civil power may contribute to the protection, but can not interfere to destroy or fritter away.

The civil courts will interfere with churches or religious associations, when rights of property or civil rights are involved. But they will not revise the decisions of such associations, upon ecclesiastical matters, merely to ascertain their jurisdiction. As we understand the position of the defendant in error, his civil rights are not so endangered as to require our interposition. It may not be improper to collate some of the authorities which bear upon this question. The controlling principle is declared in the 24th Statute of Henry VIII.: "Causes spiritual must be judged by judges of the spirituality, and causes temporal by temporal judges." In *Baptist Church vs. Witherell, 3 Paige (N. Y.), 296,* the Chancellor said: "Over the church, as such, the legal tribunals do not profess to have any jurisdiction whatever, except to protect the civil rights of others, and preserve the public peace. All questions relating to the faith and practice of the church, and its members, belong to the church judicatories, to which they have voluntarily subjected themselves." In *Lawyer vs. Cipperley, 7 Paige (N. Y.), 281,* it is said: "The church, as to its doctrines, government, and worship, is to be governed by its peculiar rules." In the case of *Gable vs. Miller, 10 Paige (N. Y.), 627,* the learned Chancellor doubted the soundness of his former decisions, but his decree was reversed, by the highest court in the State, by a vote of fourteen to three. *Miller vs. Gable, 2 Denio, 492.*

The same principle is enunciated in *Robertson vs. Bullims, 9 Bart. (N.Y.), 64,* and *Diefendorf vs. Rep. Col. Church, 20 Johns. (N. Y.), 12.*

In the case of the *German Reformed Church vs. Seibert,*

3 Barr., 291, it is said: "The decisions of ecclesiastical courts are final, as they are the best judges of what constitues an offense against the word of God, and the discipline of the church." The Court of Appeals of Kentucky, in *Shannon vs. Frost, 3 B. Monroe, 258,* says: "This court, having no ecclesiastical jurisdiction, can not revise ordinary acts of church discipline or excision." In a recent case, of *Forbes vs. Eden, Cases in the House of Lords, 3d Series, Vol. 5, 36,* decided in 1867, the Rev. Mr. Forbes alleged that he could not conscientiously obey certain canons, and that, as a consequence, he might be degraded from his office of minister, and be deprived of temporal advantages, the Lord Chancellor said: "Appellant does not allege any actual damage, but founds his action upon a possibility of damage hereafter," and that "it was a mere abstract question, involving religious dogmas, and resulting in no evil consequences, which would justify the interposition of a civil court." Lord Cranworth said: "There is no authority in the courts to take cognizance of the rules of a voluntary society . . . save only so far as it may be necessary for the due disposal and administration of property." Lord Colony said: "A court of law will not interfere with the rules of a voluntary association, unless it is necessary to do so to protect some civil right."

In *Gartin vs. Penick,* in the Court of Appeals of Kentucky, in 1869, Judge Robertson, who delivered the opinion of the court, said: "Christianity, though an essential element of conservatism, and a great moral power in the State, should only work by love, and inscribe the laws of liberty and light on the heart; and the civil government has no just or lawful power over the conscience, or faith, or form of worship, or church creeds, or discipline, as long as their fruits neither impinge civil supremacy, demoralize society, or disturb its peace of security." In reference to church members he said: "They joined the church with a knowledge of its defined powers, and as the civil power can not interfere in matters of conscience, faith, or disci-

pline, they must submit to rebuke or excommunication, however unjust, by their adopted spiritual rulers."

In the only case in this court where this question has been adverted to, the court says: "We will decide nothing affecting the ecclesiastical rights of a church, which we are not competent to do; its civil rights to property are subjects for our examination, to be determined in conformity to the laws of the land, and the principles of equity." *Ferraria vs. Vaconcellos, 31 Ill., 25.*

There are some authorities in favor of interference, but the cases collated declare the law, as we think it ought to be. We have been referred to numerous cases in Massachusetts. The Constitution of that State, from 1780 to 1833, made it the duty of the Legislature to "require the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily."—Const. Mass., Part 1, Art. 3. Laws were passed for the purpose contemplated, and an ecclesiastical law has thus grown up there. These decisions are not applicable in the State, as legislative and judicial interference in such matters is expressly forbidden by the Constitution, which all are bound to obey.

The case may, then, be briefly summed up: A rector in the church is charged with nonconformity to its doctrines; intentional omissions in the ministration of its ordinances; and the attempt is made to organize a court, composed of his brother-clergymen, for his trial. He appeals to the civil court, and alleges as the chief reason for interposition, the want of authority in the spiritual court to try him, and a misconstruction of the canons. The same point was made to that court, and its power denied. It was urged with the same earnestness, and enforced with the same arguments there as here. The court overruled the objection, and decided that it had

jurisdiction. Five intelligent clergymen of the church, presumed to be deeply versed in biblical and canonical lore, were more competent than this court to decide the peculiar questions raised. Why should we review that, and not every other decision, which involves the interpretation of the canons? It is conceded that when jurisdiction attaches, the judgment of the church court is conclusive, as to purely ecclesiastical offenses. It should be equally conclusive upon the doubtful and technical questions, involving a criticism of the canons, even though they might comprise jurisdictional facts.

It requires no more intellect, information, or honesty to decide what is an ecclesiastical offense, than to determine the authority of the court, according to the canons. The distinction is without a difference.

Civil courts have duties and responsibilities devolved upon them, and a well-defined jurisdiction to maintain. The church has more solemn duties, more weighty responsibilities, and an authority granted by the infinite Author of all things. We shall not enter in, and "light up her temple from unhallowed fire." The ministers selected to sit in judgment on the acts of a brother, ought to be impartial and competent, prompted, as they doubtless are, by the teachings of divine revelations, and the kindly influences of Christian charity, which "suffereth long and is kind; beareth all things, believeth all things, hopeth all things, endureth all things."

Having given this case a most careful consideration, our deliberate judgment is, that the ecclesiastical court ought not to be restrained by the mandate of this court.

It is ordered that the decree of the Superior Court be reversed, the injunction dissolved, and the bill dismissed.

Decree reversed.

There was a separate opinion by Justices Lawrence and Sheldon.

Bird *vs.* St. Mark's Church of Waterloo.
The Supreme Court of Iowa,
December, 1883.
Reported in 62 Iowa Reports, 567.

The plaintiff brings this action for the recovery of $206.50, a balance which he alleges to be due him as rector, for the year 1880, of St. Mark's Church of Waterloo, of the denomination known and styled "The Protestant Episcopal Church in the United States of America." Upon the production of the plaintiff's evidence, the Court, upon motion of the defendant, directed a verdict for the defendant. The plaintiff appeals.

The opinion of the Court was delivered by Chief Justice Day:

1. The plaintiff took and offered in evidence the deposition of William Stevens Perry, bishop of the Protestant Episcopal diocese of Iowa. The defendant moved to suppress interrogatories five and six, and the answers thereto, in this deposition, upon the ground that they were immaterial and incompetent, and the answers state an opinion or conclusion of the witness, instead of facts, and are not pertinent to any issue involved in the action. The Court sustained the motion, and this action the plaintiff assigns as error. The portion of the deposition suppressed contains the following evidence: "A parish is also the individuals who associate themselves under articles of incorporation, and, in their formal application for admission, on their pledge of conformity to the diocesan and general legislation of the church, are received into union with the diocesan convention. St. Mark's Parish, Waterloo, is such an association of individuals, formally admitted into union with the diocesan convention of the Protestant Episcopal Church in Iowa in 1863, and still in union with said convention, and in common with other parishes, amenable to the diocesan and general canons. A rector, as the word is understood by the canons of the church, is a duly ordained clergyman of the church, in priest's orders, who has been elected to the rectorship by

the vestry of the parish, agreeably to the canons of the church, and in whose call, or invitation, or notification of election, there is no limitation of time specified when the engagement, or contract (for such the engagement between the clergyman and vestry, as two principals, is considered) is to cease."

This portion of the deposition was improperly stricken out. It was certainly competent to prove by the bishop of the church the meaning of the word parish and rector, as understood for the canons of the church. But the important and material portion of this testimony is that which states that St. Mark's parish of Waterloo, was formally admitted into union with the diocesan convention of the Protestant Episcopal Church in Iowa. Such admission rendered the defendant amenable to the canons of the church, which, the evidence shows, are adopted by general and diocesan conventions—the general convention composed of clerical and lay deputies, meeting every three years, and possessing supreme legislative power, and the convention of the diocese, composed of the clergy and lay deputies from each parish, meeting annually. It is not objected that this evidence is secondary, but that it is incompetent, immaterial, and the statement of an opinion. The evidence was both competent and material, and the statement of a fact and not of an opinion. The court erred in suppressing it.

2. The error of the court in rejecting the evidence offered is, however, immaterial, unless the testimony offered, in connection with that produced upon the trial, was sufficient to warrant a finding for the plaintiff. It therefore becomes necessary to consider the effect of the entire testimony offered by the plaintiff. The evidence shows that the Association of St. Mark's Church of Waterloo, Iowa, adopted articles of incorporation, the preamble to which is as follows: "We, whose names are hereunto affixed, deeply sensible of the truth of the Christian religion, and earnestly desirous of promoting its holy influence in our hearts, and in those of our families and

neighbors, do hereby associate ourselves under the name of St. Mark's parish, in communion with the Protestant Episcopal Church in the United States of America and the diocese of Iowa, the authority of whose constitution and canons we do hereby recognize, and to whose liturgy and mode of worship we promise conformity."

Article 1 provides: "This association is incorporated by the name and style of St. Mark's Church of Waterloo, Black Hawk County, Iowa."

Article 5 provides: "The members of this corporation desire admission into union with the convention of the diocese of Iowa." Bishop Perry testifies that St. Mark's parish, Waterloo, was formally admitted into union with the diocesan convention of the Protestant Episcopal Church in Iowa, in 1863. The diocese of Iowa comprises the entire State, and was, on joint vote of two houses of general convention, admitted into union with the church in the United States. The constitution of this diocese, Article 1, provides as follows: "This church, as a constituent part of the Protestant Episcopal Church in the United States of America, acknowledges the authority of the said church."

Section 5 provides: "Wherever the term rector is used in this or any other canon of this diocese, it is to be understood of any minister duly elected by the vestry to the charge of a parish; and it is hereby recommended that every rector be instituted, according to the provisions of the church. Canon 4, Title 2, of the canons for the government of the Protestant Episcopal Church in the United States of America is entitled: "Of differences between ministers and their congregations, and of the dissolution of a pastoral connection." Section 1 provides: "A rector canonically elected and in charge or an instituted minister, may not resign his parish without the consent of said parish, or its vestry (if the vestry be authorized to act in the premises), nor may such rector or minister be removed therefrom by said parish or vestry against his will, except as hereafter provided."

The next section provides for the dissolution of the pastoral relation, when the parties can not agree respecting the separation, by the bishop, acting with the advice and consent of the standing committee of the diocese or missionary jurisdiction.

At a meeting of the vestry of defendant, December 23, 1878, "It was moved and carried unanimously to accept Rev. F. M. Bird's proposition to become rector of St. Mark's parish, at a salary of $1,000 a year. It was resolved that the secretary notify Rev. F. M. Bird of his election as rector of St. Mark's parish." On January 4, 1879, the secretary of the vestry gave the plaintiff formal notice in writing of his election, as follows: "I take great pleasure to inform you that, at a meeting of St. Mark's vestry, December 23, 1878, you were elected as rector of St. Mark's parish, service to commence and date from January 1, 1879." For that year he was paid in full, one thousand dollars. In the month of November, 1879, he received a communication from the secretary of the vestry, as follows: "At a meeting of St. Mark's vestry, held November 11, 1879, the following resolution was introduced and adopted: '*Resolved*, That, whereas there will be a large deficiency in the finances for the present year, and there being no prospect for an increased revenue for the coming year, and not desiring to incur any liability in excess of our resources, we hereby tender you for your salary in full, for the year 1880, the full proceeds of pew rents.'" The plaintiff communicated with the vestry very shortly after this notice, and told them that it was not in their power to set aside the contract without his consent, which consent he refused to give, and that he held them to their contract as binding. At a meeting in January, 1880, a number of the vestry desired the plaintiff to accept the pew rents for 1880, and relieve the vestry of further responsibility, which the plaintiff refused to do, and he never at any time assented to the defendant's proposition. The plaintiff continued to perform the duties of rector until January 1, 1881, when the relation between him and

the parish was dissolved. For the year 1880 the plaintiff has received the pew rents, amounting to $793.50. He claims that he is entitled to the sum of $1,000 for that year.

The defendant, by its articles of incorporation, its admission into union with the diocese of Iowa, and its connection through that with the Protestant Episcopal Church in the United States, acknowledged the authority of the constitution and canons of that church, and became amenable thereto. One of their canons is that a rector canonically elected, and in charge, may not be removed by his parish against his will. The plaintiff was elected rector by the vestry of the defendant, in accordance with the canons of the diocese of Iowa. When he accepted the position and entered upon the discharge of his duties, the relation between him and his parish was assumed under, and became subject to, the canons relating to differences between ministers and their congregations, and the dissolution of a pastoral connection. It was not competent for the vestry of the parish, in violation of the canons of the church, to dissolve the pastoral relation against the plaintiff's will. These canons became just as much a part of the contract of employment of plaintiff, as if they had been specifically referred to, or written out in full therein. The salary upon which the plaintiff was employed constitutes an essential part of the contract. If the defendant could be permitted to reduce the plaintiff's salary without his consent, it could force him to agree to a dissolution of the pastoral relation, and thus accomplish indirectly what it could not do directly. The right to the salary stipulated at the time the plaintiff accepted the position of rector is a valuable property right secured to the plaintiff by contract. One party to the contract can not ignore its provisions or violate them with impunity. The civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but they will interfere with such associations when rights of property or civil rights are involved. *Chase vs. Cheney, 58 Illinois, 509*

(537); O'Hara vs. Stack, 90 Pa. St., 477 (491); Avery vs. Inhabitants of Tyringham, 3 Mass., 159 (167); Sheldon vs. Congregational Parish, 24 Pick., 281; Lynd vs. Menzies et al., 33 N. J. L., 162; Batterson vs. Thompson, 8 Phil. Rep., 251. In this case the plaintiff has performed the duties of rector for the defendant for the year 1880. He has been paid but a part of the salary promised him when he assumed the duties of that position. He never consented to a reduction of his salary. A clear legal right of the plaintiff has been invaded, and it is the duty of the civil courts to protect and enforce that right. We think the plaintiff is entitled to the balance of the salary which formed the consideration of the contract between him and the defendant. The judgment of the court below is

Reversed.

Justice Adams *dissenting.*

Stack *vs.* O'Hara.
The Supreme Court of Pennsylvania,
October 1, 1881.
Reported in 98 Pennsylvania St. Reports, 213.

Mr. Justice Trunkey delivered the opinion of the court October 3, 1881:

When the plaintiff was ordained he obligated himself as follows: "I, Michael P. Stack, promise and swear that I will serve the missions of the diocese of Philadelphia, under the obedience of the ordinary, forever, *in perpetuam*, so help me God, and these His holy gospels." Toward the end of the ceremony he placed his hands in those of the bishop, who then asked him, "Do you promise me and my successors obedience and reverence?" and he answered "I do promise it."

In the United States the Catholic Church is missionary, and there are no parish priests except, perhaps, in a portion of the territory acquired from France. The plaintiff assumed to discharge the functions of a priest in the missions of the diocese. Since his ordination the diocese of Scranton has been created of territory formerly within the territory of the diocese of Philadelphia, and his obedience and reverence became due to the bishop of Scranton. Both bishop and priest, in their respective relations are bound by the laws of their church, which are applicable to the missions in this country, and these laws define and limit the authority of the one and the obedience of the other.

The primary question is, whether a priest appointed by his bishop to a mission in the diocese is removable at the will of the bishop? This question was not submitted to the jury, but the court instructed them that under the law of the church a bishop has not only the right, but it is his duty, to remove a priest for sufficient cause. A number of the assignments of error are based upon that instruction. However much the plaintiff differs from all other witnesses respecting the unwritten law, or in his inferences from the written, there is no conflict in the

testimony as to what the written law is which touches the question. Both parties concede the applicability of the enactments of the second Baltimore Plenary Council of 1866, a portion of which is proved by each. Paragraph No. 108 is thus rendered by Dr. Corcoran: "We confirm and again promulgate some decrees which have been passed by former councils of Baltimore. Whereas, very often it has been called into doubt by some whether prelates of the church had power in these States of the Union to depute priests, send them into another part of their diocese for the purposes of the sacred ministry, and also recall them when they judge fit in the Lord, we admonish all priests who live in this diocese, whether ordained therein or admitted into the same, that, mindful of the promises that they have made at their ordination, they refuse not to attend any mission that shall be assigned to them by their bishop, if the bishop judge it sufficient for the decent sustenance of their livelihood, and consider also that that office be suitable to their strength and health. By this declaration, however, we wish to change nothing as to those priests who hold parochial benefices, of which one only, to wit, in the city of New Orleans, is yet known to exist in this country. Nor do we, by any means, intend to derogate from the privileges that have been accorded to religious persons by the Holy See. Affirming the duty of the priest to attend to any mission that may be assigned to him, and recognizing the power of the bishop to appoint him thereto, or to recall him thence."

The plaintiff gives paragraphs 123 and 124 as follows: "Since formerly there existed by the highest, by the best right, as the Council of Trent says, distinct dioceses and parishes, and proper pastors were given to each flock, and there were rectors of minor or inferior churches who should have the care, each one of his own flock; it is altogether desirable that, according to the custom of the universal church, parish priests properly so-called, as they exist in Catholic countries, should be constituted also in the churches of our provinces; but such is the condition

of our times and circumstances that this can not yet be done. The Fathers of this Plenary Council, however, are of the sentiment—their mind is—that gradually, and as far as circumstances will allow, our discipline in this matter may be conformed to the discipline of the universal church, or the universal discipline of the church." "We will, therefore, or wish, that through all these provinces, especially in the larger cities where there are many churches, a district after the manner of a parish, with accurately described limits, be assigned to each church, and that the rector thereof be accorded the right parochial, or quasi-parochial rights."

And Dr. Corcoran states Paragraph 125 thus: "By making use of the words parochial right, parish, and parish priest, we by no means intend to accord to the rector of any church that right which is called immovability, or to take away or in any wise diminish that power from the discipline received in these provinces, the bishop possesses, of depriving any priest of his office, or transferring him elsewhere. But we admonish and exhort all bishops that they should use this, their right, only for grave reasons, and taking into full consideration the personal merits of the individual."

These provisions, in enactments specially made for the church in the United States, are too plain to admit of doubt as to the bishop's power to remove a priest. Their interpretation was for the court: *Sidwell vs. Evans, 1 P. & W., 383; Bock vs. Lanman, 12 Har., 435.* When the testimony is of unwritten law, and is conflicting, a different case is presented, of which we need not speak. The council expressed a strong desire that parish priests, as they exist in Catholic countries, should be constituted here; but declare the condition of our times and circumstances such that this can not yet be done. Although they will or wish that in these provinces, in localities where there are many churches, a district after the manner of a parish may be assigned to each church, and that to the rector may be accorded the right parochial, or quasi-paro-

chial rights, they proclaim that it is not in any wise intended to diminish that power the bishop possesses of depriving a priest of his office, or transferring him elsewhere. They affirm and again promulgate the duty of the priest to attend any mission that may be assigned to him, and recognize the power of the bishop to appoint him thereto, or to recall him thence.

The pastoral relation is neither created nor dissolved by agreement between the priest and congregation—the bishop appoints or removes the shepherd as he deems for the priest's good, or for the interest of the flock.

Removal is the exercise of episcopal authority according to the bishop's judgment. It may be without supposition of wrong, and it leaves the priest in the same position as all other priests who are without employment. Suspension is a judicial act based on something which calls for such sentence. A sentence of suspension follows a trial for an offense, from which the priest may appeal; but for a removal, the priest may not have recourse to the bishop's superior. To confound removal with suspension, acts so different in character, is to lay the groundwork for misapplication of certain laws of the church, and also for the false conclusion that the bishop has no power of removal for grave cause, unless there first be a trial for some ecclesiastical offense.

When a priest is accused of an offense for which he may be convicted and punished, he is entitled to a trial according to the laws of the church, before he can be sentenced. But the law relating to such case throws no light on the question of the bishop's power of removal. Nor do the laws respecting parish priests, in Catholic countries, control enactments made for the government of bishops and priests in this country. It is true, as the plaintiff contends, and for which he cites Dr. Smith's "Elements of Ecclesiastical Law," p. 381, that pastors in the United States should not be dismissed from their parishes, *ratione criminis*, save on regular trial; and no priest accused of an offense shall be punished save on regular trial. This

has no bearing on the question of the bishop's power of removal at his discretion. As quoted in the plaintiff's own testimony, the same author, p. 170, Sec. 401, says: "Ecclesiastics who are removable at the will of the bishop may be, even against their will, dismissed without such trial or sentence." And p. 178, Sec. 417: "The following ecclesiastical officeholders, chiefly, are removable at the nod of the bishop—at the bishop's will. . . . all pastors in this country, save one, perhaps, in New Orleans." And p. 179: "Again, bishops in this country do not, as a rule, remove pastors without sufficient reasons. Hence, in case a pastor is removed *sine causa*, without at the same time being placed over another congregation of equal importance, he may have recourse to the superior for redress, since such removal would seem to be not only illicit, but invalid." The author treats a dimissal *ratione criminis*, as a very different thing from a removal for grave reason by the bishop, at his will.

Aside from the written law, the evidence is strong that it has been the usage for bishops to appoint and remove pastors, from the planting of the church in the colonies to the present time. Though often the power has been doubted, contests by priests in the civil courts on the ground of illegality have been very few. It is not alleged that such removal had been declared unlawful previous to the litigation between these parties. In a recent case, among the conceded facts was this: "By the usages of the Roman Catholic Church in New England, . . . the bishop appoints the priests to the several parishes in his diocese, and removes them at his pleasure." *Hennessey vs. Walsh, 15 Am. L. Reg., 264.* However clear the bishop's power to remove a priest at his pleasure may appear in the unwritten law, we shall not dwell thereon, for the written law is conclusive on the question.

. . . . . .

The plaintiff urges that the removal so injured him in the property of his profession that if not contrary to the laws of the church, it is to the supreme law of the land.

His profession is that of a priest in the church. He acquired it by compact. He holds it under a promise to obey the laws of the church and the proper orders of the bishop. Were his contract void for its immorality or illegality, he could recover nothing from its breach. If illegal, he is neither entitled to restoration nor to damages for his removal. If legal, and his removal was authorized by the terms of the compact, no law of the land is violated. In this country the Church is completely separate from the State. Every church organization is voluntary on the part of its members, and the terms and conditions depend entirely upon its own rules. The profession of priest or minister in any denomination is taken subject to its laws. These he agrees to obey. If they become distasteful to him he can withdraw—no power can compel him to remain and perform his priestly functions; but if he violates the laws of his church, or disobeys the lawful commands made in accord with his compact, the civil courts will not maintain his footing in the church. If the plaintiff was removed in accord with the law of the church he has no cause of complaint. If such laws provide that the bishop may remove a priest without trial, he has no right to a trial, and if they provide that he shall have recourse to the bishop's superior in case of wrongful removal, his remedy is by such recourse, for this is his contract.

The late Judge Redfield, in a note to *Hennessey vs. Walsh, supra*, said: "Some principles are well settled by the repeated decisions of the courts with slight or no conflict. 1. The decisions of ecclesiastical courts, having by the rules or laws of the bodies to which they belong, jurisdiction of such questions, or the right to decide them, will be held conclusive in all courts of the civil administration, and no question involved in such decisions will be revised or reviewed in the civil courts except those pertaining to the jurisdiction of such courts or officers to determine such questions according to the law or usage of the bodies which they represent. 2. It is a universal rule of law, applicable not only to this subject, but to all subjects

connected with legal administration, that one who becomes a member of any church or other society thereby consents to be governed by the rules, or laws, of such organization, and that he can not justly claim to have suffered wrong or injury by the enforcement of such rules upon himself or his property, upon the maxim, *volanti non fit injuria.* And this maxim applies to cases when the party voluntarily places himself in a position ultimately to have an act done affecting his interests, or done at the will of another, as if he subjected himself directly and immediately to the act; upon the principle that one who puts the slowest agencies at work, which are sure in the end to produce a given result, is as truly the author of the ultimate result as if produced by ever so immediate and direct causes. 3. That the courts will not interfere with the internal police and discipline of churches, or other voluntary societies, so long as they keep within the reasonable application of their own rules, which were known to the members, or might have been learned by them, upon reasonable inquiry, at the time of connecting themselves with the society or church."

The foregoing clearly stated principles repel the conclusion that the plaintiff's removal, if in accord with the law of the church, was contrary to the law of the land. They also show that the civil courts will not interfere where the ecclesiastical courts or offices have jurisdiction and have acted under their own rules, giving them a reasonable application. At the time the plaintiff was ordained, the law of the church was the same as now; no right has been taken away from him or duty imposed by subsequent legislation; he knew then that if appointed to a mission he was subject to removal, and the high authority, quoted in his testimony, says that if wrongfully removed he may have recourse to the superior for redress. He sought no redress under the law of his church, but at once resorted to the civil courts. Without saying that the court below erred in his favor—this question is not raised in the record—he was allowed the utmost latitude con-

sistent with the religious liberty of the church. The Catholic priest is as much bound by the law of that church as is any Protestant preacher by the law of his. A principle that would authorize the civil courts to interfere with the pastoral relations, or with the operation of church laws, or with the discipline of members, in one religious organization, would also in all others. The church should be free to deal with its members, officers, and ministers, according to its laws and established usages. It would be a grievous wrong to the church to rule that its priests and ministers are exempt from its proper discipline and authority because of their profession. They have no property in such profession that is shielded from the consequences of their broken vows and compacts. They neither acquire nor hold it as they do lands or chattels.

From what has already been said with reference to other points, it follows that the court was right in ruling that, "To enable the plaintiff to recover, the jury must be satisfied from the evidence that the plaintiff was wrongfully and unlawfully removed from his charge." Acting in the office of bishop, making a removal under the laws of the church, it will not be presumed that it was wrongfully made by the defendant.

. . . . . .

Judgment affirmed.

Mr. Justice Mercur, dissenting, filed an opinion in which Justice Gordon concurred.

Tuigg *vs* Sheehan.

The Supreme Court of Pennsylvania,

Reported in 101 Pa. St. Reports, 363.

Mr. Justice Paxson delivered the opinion of the court November 20, 1882:

This case has been so completely buried under a load of ecclesiastical lore that at first sight it would seem to present several points of apparent difficulty. When, however, it is examined critically, the supposed difficulties disappear, and the only real question in controversy can be disposed of by the application of a few well understood principles of law.

The case below was this: The plaintiff, Rev. Patrick M. Sheehan, is a priest connected with the Catholic Church, and brought an action of assumpsit against the defendant, The Rt. Rev. John Tuigg, Bishop of the Diocese of Pittsburg, to recover the sum of $2,400, being three years' salary as priest, at the rate of $800 per year. The suit has not been based upon actual services, for it was conceded that during the period within which compensation was claimed no services had been performed, but upon the duty to support its priests, which, it was alleged, was a part of the law of the Catholic Church. The statute law of the diocese, as found by the learned court below, fixes the salary of a priest in charge of a parish at $800 per annum, the amount claimed by the plaintiff. The court held that he could not recover this salary under the statute, but awarded him the sum of $800 for the three years, under " the common law of the church, which guarantees him a decent support."

It appears from the facts found by the court that about the close of the year 1870, the plaintiff resigned his congregation or mission at Canelon's Bottom, Indiana County, Pa., on account of ill health. The resignation was accepted by the Rev. John Hickey, who was at that time administrator of the diocese. Subsequently, Father Hickey gave the plaintiff leave of absence until his health should be restored. He was absent until 1875, and re-

turned to Pitsburg in October of that year. Bishop Domenec was at that time Bishop of the Diocese of Pittsburg. From 1875, up to the consecration of the defendant as bishop of this diocese, some negotiations appear to have been going on with a view of assigning the plaintiff to some ecclesiastical duty. Nothing came of it, however, and after the date of Bishop Tuigg's consecration the plaintiff applied to him, by letter and otherwise, for an appointment to a mission or congregation. The request was refused by the bishop for the reasons: 1. That the plaintiff was not a member of the diocese of Pittsburg, but properly belonged to Allegheny; and, 2. That the bishop was not satisfied of the plaintiff's fitness for the charge of a congregation, and required some evidence on that point, especially of his deportment during his absence from the diocese. It appears that the bishop had evidence that during the plaintiff's absence " his course of life had not been regular." After this refusal of Bishop Tuigg, the plaintiff wrote to Archbishop Wood, of Philadelphia, to intercede in his behalf, but without effect. He then went to Rome and made an informal complaint against the bishop. He remained in Rome until 1878. While there Bishop Tuigg received three letters from the Prefect of the Propaganda in Rome, in which reference was made to the plaintiff's irregular habits. The plaintiff left Rome in 1878, stopped a few days in London, landed in New York, where he remained for several weeks, and then went to his mother's in Virginia, where he resided until the following spring. He came to Pittsburg in June, 1879, and made another demand upon the bishop for work or a support, and was refused. Whereupon he brought this suit against him, claiming three years' salary.

The learned court found that " the plaintiff was not tried and convicted of any offense; he was not notified of any charges or complaints against him; he was not removed from any mission, congregation, or post; nor was he formally suspended from the office, functions, rights, or privileges of a priest. He was simply denied an appoint-

ment to any work, and refused any support by the defendant, on the ground that plaintiff was not a priest of the diocese, or, if he was, he was unfit to have charge of a mission or congregation."

That the defendant acted in entire good faith and from conscientious motives is not only shown by the evidence but is found by the court below. The learned judge says in the conclusion of his finding of facts: "I take great pleasure in saying, and so find if it be material, that there is no evidence that Bishop Tuigg, in the treatment of the plaintiff, was influenced by any personal, hostile, or unkind feeling toward him. He acted from a conscientious sense of duty. He did not regard Father Sheehan as a priest of the diocese for whom he was bound to provide, but considered him more properly belonging to the diocese of Allegheny. From what he knew or had heard, he doubted his fitness for a charge of a congregation. He requested evidence of his fitness, either by letters, or trial in a religious house, before he could give him work or engage to support him; and the facts of the case justified these doubts and caution. Father Sheehan had been absent from his diocese more than four years, and when he returned he brought no letters or evidence as to his deportment during his absence. His non-employment and non-exercise of the priestly functions, for six months immediately preceding the advent of the defendant as bishop of the diocese, were calculated to excite suspicion. His long delay in reporting himself, after being sent home from Rome, was inexcusable, and no doubt had great influence in defeating his application in 1879."

Under these circumstances, is the bishop liable in an action at law to the plaintiff for his salary, or any equivalent in the way of support? There are many duties in life, which, in the absence of a contract, the law will not enforce specifically, nor will it give compensation in damages for the breach thereof. Had the plaintiff sought redress within his church his rights would have been determined by the laws of the church. When, however, he

seeks the aid of the civil courts, he is to be treated precisely as any other citizen, and his rights determined by the same standard. He has brought an action of assumpsit, and, to sustain it, he must show a contract, express or implied. Has he shown such a contract? If so, when, where, and with whom was it made, and what were its precise terms? It certainly was not made by Bishop Tuigg, for the reason that when he was consecrated bishop in 1876, the plaintiff was without a congregation, and had been absent for several years. Was it made with Bishop Domenec, the predecessor of the defendant in his office of bishop of Pittsburg? There is no such evidence, and there is no such finding by the court below. All that can be and was claimed, is that the church is bound by its own organic law to provide a decent support for its priests. That it is the duty of a religious denomination to provide a support for its teachers is a fact that is recognized, with a few exceptions, all over Christendom. It is said, however, to be especially binding upon the Catholic Church, for the reason that its priests are debarred by its canons, and by their ordination vows, from engaging in any secular employment, and that from these vows not even the bishop can absolve them. However binding such a duty may be *in foro conscientiæ*, when it comes to its enforcement in a court of law the plaintiff must show a contract. With all the ingenuity and learning that have been exhibited in this case, no contract relation has been established. The duty of the church to support its priests bears some analogy to the obligation recognized by several religious denominations to support their own poor. Yet it has never been supposed that this duty involved a contract relation which would sustain an action at law for its non-performance.

The plaintiff alleges that the law of his church creates a duty from which springs an implied contract on the part of the bishop to support him so long as he remained a priest of the diocese, and was not convicted of any offense, or suspended from his priestly functions. Is this position

sound? The obvious test is to reverse the position and treat this as a suit by the bishop to recover damages from the plaintiff for a failure to perform his priestly functions or any duty prescribed by his ordination vows. No one will contend that such a suit could be maintained. The plaintiff can lay down his office and duties at pleasure. For doing so he could only be visited with ecclesiastical censure and such punishment, if any, as the canons of the church prescribe. The bishop would have no remedy in the courts of law. It will thus be seen that there is no mutuality.

If we assume a contract relation between the bishop and the plaintiff it must be either that of principal and agent, or hirer or hired. This involves the right of either party to end the contract. As before said, the plaintiff may end it at pleasure, and the bishop would have no remedy in damages. The plaintiff can have no higher right.

The duty of the church to support its priests must have some qualification, even *in foro conscientiæ*. The right to support may depend upon the manner in which the priest performs his official duties, and the nature of his walk and conversation in life. He may in many ways render himself unfit for his holy calling, and yet avoid a conviction for crime, or perhaps removal from office. The usefulness of a priest may be destroyed, and yet he may truly say I have violated no law of the land or of the church. There must be a discretion left somewhere to decide such questions, and we see no authority competent to do so but the bishop. To throw such a question into the jury-box in a common law proceeding would be as novel as it would be unsafe. The bishop exercised his discretion in this instance, and the court below set his judgment aside. Yet upon the finding of facts by the learned judges, the bishop was fully justified. If a priest by reason of his equivocal conduct becomes unfitted to perform his priestly functions, it is difficult to see by what

rule of ecclesiastical or civil law he is entitled to a salary or support.

It would be doing a wrong to the Catholic Church and degrade its priesthood from their high position were we to hold that the relation between the bishop and his priest was that of hirer or hired, of employer and employee. The moving consideration in such contracts is the pecuniary advantages flowing from the relation. When a priest dedicates his life to the church and takes upon himself the vows of obedience to its laws, he is presumed to be actuated by a higher principle than the hope of gain. Where he has an actual contract with his congregation or his bishop for a salary, it may be enforced as any other contract; but where he relies upon the duty of his church to support him, he must invoke the aid of the church if he seeks redress.

The civil courts wisely decline to interfere in ecclesiastical controversies except where rights of property are concerned. In the latest case in this court upon this subject it was said: "The profession of a priest or minister of any denomination is held subject to its laws; the priest acquired it by compact, and is not exempt from the proper discipline and authority of his church; he has no property in his profession that shields him from the consequences of his broken vows and compacts."— *Stack vs. O'Hara* (*Pittsburgh Legal Journal, Vol. XII, U. S.*, 65). To the same effect is *Cheeney vs. Protestant Episcopal Bishop of Illinois* (58 *Ill. Rep.* 509.) The recent case of *Rose vs. Vertin* (46 *Mich.*, 457) closely resembles the one in hand. It was there held that the priest could not recover his salary from the bishop; that the latter was merely his superior officer in the church, clothed with the appointing power, and that the exercise of such power in assigning a priest a congregation did not make the bishop liable. It was said by Graves, J.: "The main facts in the case are undisputed, and the only question is concerning their effect; and in my opinion they show distinctly that the relation between Bishop Wrack and the priest was never that of

hirer and hired in any sense, implying an obligation on the bishop to pay the priest. The bishop was the priest's superior, and, according to the established order of things in the economy of church government regulating the degrees of subordination and the methods of administration, it was the province of the bishop to designate the place for the priest to exercise his functions and to prescribe under certain limitations the rules for his guidance and control.

We are of opinion that there was no such contract relation between these parties as will sustain this action. This renders any further discussion of the case unnecessary.

The judgment is reversed.

Ellen Leahey *vs.* John J. Williams.
Supreme Judicial Court of Massachusetts,
1886.
Reported in 141 Mass. Reports, 345.

W. Allen, J.—The Chuch of the Immaculate Conception was a Roman Catholic church belonging to the diocese of Boston. The defendant was the bishop of the diocese, and held the title to the real estate used for the church.

The pastors of the church borrowed money of the plaintiff, and of many other persons, for the use of the church, upon written contracts of repayment in the form of deposit books in the name of the church. As the church had no corporate existence, and was incapable of contracting or of holding property, there was no validity in the contracts as between it and the plaintiff. The plaintiff's case is, that the defendant is the principal, on whose credit the pastors borrowed the money. The only exception we need consider is that to the refusal of the court to rule that the evidence was not sufficient to charge the defendant.

The evidence was undisputed that the money received from the depositors was mingled with the revenues of the church, and went to constitute a common fund, out of which were paid the ordinary expenses of the church, debts of the church, including payments to depositors, and payments for real estate.

The defendant, in accordance with the usages of the Roman Catholic Church in this country, held the legal title to all the real estate of the church. The court properly instructed the jury, that, if the defendant borrowed the money by his agents, and put it into real estate, it was immaterial whether such real estate was held by him in trust, or as his individual property. No inference, however, that the money deposited belonged to the defendant can be drawn from the fact that the pastors applied a portion of it to the purchase of real estate for the church, the legal title of which was put in the de-

fendant. There was no evidence that the defendant had any connection with the real estate, or with the moneys deposited by the plaintiff and others, except what arose from his relations to the church and its pastors as their bishop. There was no express authority given by him to the pastors to borrow the money on his credit, and all his acts in relation to it are properly referable to his official character as bishop.

The argument is, that the pastor of a Roman Catholic church exercises, in regard to the church over which he is placed, only the delegated authority of the bishop, and acts only as agent of the bishop; and, therefore, that those transactions are to be regarded as made by the bishop himself. Assuming, without deciding, that in such case the bishop would be personally liable on the contracts made by the pastor in the name of his church, we do not think that there was evidence in this case to prove that the pastor of a Roman Catholic church is, in regard to the pecuniary affairs of his church, the agent of the bishop, exercising from him rights belonging to him. The legal rights of the bishop in regard to the temporalities of a church are not prescribed by the municipal law, and must arise, if at all, from the relations created by ecclesiastical law. What that law is was matter of evidence, and could be known only by the very meager and general reference to it in the evidence. The testimony of the defendant, the only witness to it, that, under the canon law, which is the law of the Roman Catholic Church, the bishop has full power in the administration of church affairs; and that there are no separate parishes; that the diocese is the parish, and the bishop the universal priest; that all power possessed by priests or pastors is delegated from the bishop; that the clergyman in charge of a church for the time being has charge of all its temporalities; that it belongs to such pastor to make all contracts relating to the temporal affairs of the church, and he is not the agent or servant of the bishop in such matters; and the only control of the bishop over the pastor is by

ecclesiastical discipline; and that a bishop can not remove a priest except for cause, and by ecclesiastical discipline, will not permit an inference that the legal possession and control of the temporalities of a church, and the right of making contracts in regard to them, are vested in the bishop, and can be exercised only by him personally, or by his agent.

The decrees of council put in evidence do not afford a different conclusion. The supervision required of the bishop over the contracting of debts by priests does not appear to be the supervision of a legal principal over his agent, but of an ecclesiastical superior over the conduct of his subordinate, and the debts, which a bishop is forbidden to allow a priest to contract without written permission, do not appear to be the debts of the bishop himself. It is in accordance with the decree that bishops acquire a title to the real estate of the churches, but they do not derive title from it. The authority which the bishops delegate to the priests must be authority vested in them under ecclesiastical law, and *prima facie* is ecclesiastical authority, and must be presumed to be so in the absence of evidence to the contrary.

It being a rule of the ecclesiastical law, to which the church was subject, that a pastor shall not contract debts in the name or for the sake of his church without the written permission of the bishop, such written permission can not be evidence that debts contracted under it are the legal debts of the bishop. Nor can the fact that, after such debts are contracted in the name of the church, the bishop procures money for paying them by mortgaging the real estate of the church of which he has the legal title, and on his personal security, be sufficient to prove that he is under a legal liability to pay them; nor the fact that a bishop receives from a dying pastor funds of a church, which are paid over to the pastor's successor, be sufficient evidence that the funds belong to the bishop.

It is argued that the defendant must be liable, because, if he is not the party to the contract, there can be no

contract and no legal liability. The questions whether any one other than the defendant is liable on the contract, or whether, if there be no contract, any one is liable to the plaintiff in tort, or whether the only remedy of the plaintiff is against the fund, are not before us. It can not be assumed that the plaintiff could not have given credit to the fund. The fund would have been the ultimate resort for payment, had the church been incorporated under the statute, or had the deposits been in an incorporated savings bank; and it is not necessary that there should have been any personal liability on the contract in order that there should be a remedy against the fund.

But these questions need not be discussed. In order to charge the defendant, it must be shown that he is liable on the contract; it is not sufficient that no one else is a promiser on it. We think that the evidence was not sufficient to hold the defendant, and that the instructions asked to that effect should have been given.

Exceptions sustained.

John F. Baxter, Respondent, *vs.* Charles E. McDonnell, Appellant.

Decided in the Court of Appeals, New York, March 1, 1898.

Reported in 155 N. Y. Rep., p. 83.

Statement of the case and points of counsel are omitted.

The opinion of the court was delivered by Vann and Haight, Justices.

Vann, J.—While the questions certified to us for decision involves, directly, the sufficiency of the third defense set forth in the answer, it involves, indirectly, as we have held, the sufficiency of the complaint also. *Baxter vs. McDonnell, 154 N. Y., 432.* When reduced to their simplest form, the substantial allegations of the first cause of action purporting to be alleged are that, by the rules and regulations of the Holy Roman Catholic Church, in the diocese of Brooklyn, the bishop holds all its property, in his own name, as trustee for its benefit, and is liable, individually, upon all contracts for services rendered or materials furnished to the church; that each priest assigned to duty is authorize to hold the bishop, individually, liable for his salary, and that it is the duty of the bishop to provide by will for the devolution of all the trust property to the church or to his successor; that in September, 1885, the plaintiff was appointed pastor of a parish in said diocese by Bishop Loughlin, who died in December, 1891, after devising and bequeathing all the trust property, held by him for the church, to his successor in the bishopric; that in May, 1892, the defendant was installed as bishop, and soon after received the trust property, subject to the trust upon which his predecessor had held it, and upon accepting the same on his installation as bishop agreed, by virtue of the law of the church, to pay all debts incurred and to perform all contracts entered into by the late bishop in behalf of the church, in the same manner and to the same extent as if the debts had been incurred and the contracts entered into by himself. There were further allegations to the effect that,

upon this basis of liability, the defendant was indebted to the plaintiff in a certain amount.

The second cause of action is based on the assignment of the plaintiff to duty as chaplain of a hospital, made by the defendant on the 4th of December, 1892, and it is claimed that by virtue thereof he became entitled, under the constitution and ordinances of the church, to a salary of $1,000 per annum, and that the defendant is indebted to him for the balance unpaid on that basis.

Thus, in both counts of the complaint the liability of the defendant is founded upon a promise implied, as it is claimed, from the law of the church. In the first count two promises are said to arise therefrom, one on the part of Bishop Loughlin to become personally liable for the salary of the priests, and the other on the part of Bishop McDonnell to discharge the obligations assumed by his predecessor in office. The theory of the complaint is, that while the bishop holds the property of the church in trust for its benefit, he is personally liable for all services rendered to it in his diocese. No express agreement to that effect is alleged, but simply one to be implied from the rules and regulations of the church. No consideration is suggested, unless one springs from the relations of trust existing between the bishop and the church, and that relation is dependent upon the law of the church. Yet there is nothing to show the nature of the church, except as it may be implied from its name and the names given to certain of its officers. There are no allegations as to its civil rights, power, or capacity. We can not tell from the complaint, which is our sole guide, whether it is a corporation, a voluntary association, or a mere name adopted by the pleader for some purpose undisclosed. What it is, what it can do, and what can be done to it; whether it can become the beneficiary of a trust and enforce its rights as such, or sue and be sued, are not made known to us. No valid trust is alleged, unless the church is shown to be a body capable of making a contract and suing to enforce it. A trust created by the rules

of a church, which is not shown capable of making contracts, accepting benefits, or compelling performance, is not recognized by the law. The pleader seems to have assumed that the court would take judicial notice of the nature and power of the Holy Roman Catholic Church, so far as its civil rights and duties are concerned, without any averment or proof upon the subject. Judicial notice is to be taken with caution, and every reasonable doubt as to the propriety of its exercise in a given case should be resolved against it. *Brown vs. Piper, 91 U. S., 37; 12 Am. & Eng. Ency. of Law, 151.* According to the general practice of the courts in all jurisdictions, proof has been required upon the subject of church rights and powers, and what is to be proved must be alleged. Even if we should attempt to take judicial notice of the legal powers and duties of the church, it is doubtful whether the result would aid the plaintiff. Thus, Judge Strong, in his work on "Relations of Civil Law to Church Polity," says: "A very large portion of the religious societies in the country are unincorporated, and in a few of the States charters can not be obtained for them. They are, therefore, not legal entities, recognized as having a legal existence. They can neither sue nor be sued in civil courts. They can not hold property directly, yet they may control property held by others for their use. Donations and grants may be legally made to trustees for the use and benefit of an unincorporated religious society, or for the support of the gospel ministry in connection with any particular church." (p. 71.)

"There is still another mode in which property is largely held in this country for religious or church uses. In the Moravian congregations the property devoted to pious uses is held neither by a corporation nor by trustees, nor yet by the congregation itself. In some of the congregations, and I presume in all, the title to the churches, schoolhouses, and cemeteries is held by the bishop, who transmits it by will to his successor in office. And such is the tenure of most Roman Catholic churches in the

country. The title to the real estate resides in the bishop of the diocese. In a certain sense he is a trustee thereof for religious uses, but there is no declaration of trust, and he controls the enjoyment and transmits the title by devise. The purpose of this arrangement is to exclude the laity from that power of interference which they would have were the title vested in a corporation. But, inasmuch as the holders of such titles are not corporations, either sole or aggregate, as are the English bishops, deans, and even parsons, lands held by them do not pass to their successors in office unless through the instrumentality of a deed or will." (p. 109.)

We have been referred to no statute authorizing the incorporation of the church at large. By Chapter 45, of the Laws of 1863, provision was made for the incorporation of Roman Catholic churches, and for the government thereof, but it is confined to a congregation, society, or assemblage of persons accustomed to statedly meet for divine worship. This is now embodied in the Religious Corporations Law, which also provides for the incorporation of ecclesiastical bodies with governing authority over churches. (L. 1895, Chap. 723, Secs. 14, 50, and 51; L. 1876, Chap. 110; L. 1886, Chap. 210; L. 1882, Chap. 23.)

Under the Act of 1813, both real and personal property may be held in trust for the use of an unincorporated religious society without any restrictions as to time, except that it shall terminate upon the lawful incorporation of the religious society, when, by virtue of the Act, the title vests in the corporation. (L. 1813, Chap. 60, Sec. 4.) This also refers to congregations and not to the church at large. Indeed, in *Petty vs. Tooker (21 N. Y., 267, 270)*, it was held that the existence of the church proper as an organized body is not recognized by the municipal law. In *Van Buren vs. Reformed Church of Gansevoort (62 Barb., 495, 497)*, it was said: "In order to give an organization for public worship legal rights, and to impose on it legal obligations as a corporate body, there must be a special law declaring its existence, or there must be an incorpora-

tion under the provisions of the general law relating to religious societies." And, in *Hardin vs. Baptist Church (51 Mich., 137)*, Judge Cooley said: "The church is not incorporated and has nothing whatever to do with the temporalities. It does not control the property or the trustees; it can receive nobody into the society and can expel nobody from it. On the other hand, the corporation has nothing to do with the church except as it provides for the church wants. It can not alter the church faith or covenant, it can not receive members, it can not expel members, it can not prevent the church from receiving or expelling whomsoever that body shall see fit to receive or expel."

In *Silsby vs. Barlow (16 Gray, 329)*, it was said that "churches are not corporate bodies, and commonly have no occasion for the exercise of corporate powers."

Kynett and Cotton, in their work on "Churches and Other Religious Societies," say that "These two bodies, namely, the religious corporation and the church, although one may exist within the pale of the other, are in no respect correlative. The objects and interests of the one are moral and spiritual; the other deals exclusively with things temporal, and material. Each as a body is entirely independent and free from any direct control or interference by the other. . . . The church, by the nature of its organization, may be entirely independent of other ecclesiastical associations; or may be a subordinate part of some general organization or denomination in which there are superior ecclesiastical tribunals, with general and ultimate power of control, more or less complete, in some superior judicature over the whole membership of the general organization."

These citations show the danger of an attempt to take judicial notice of what the civil rights of the Holy Roman Catholic Church are, and emphasize the necessity of allegations in the complaint as the basis of evidence upon the subject.

We have no statute to guide us upon the assumption

that, by implication, it is part of the complaint. If instead of the Holy Roman Catholic Chuch, the pleader had made use of an abstract term or a name that might be applied to various organizations, incorporated or voluntary, the complaint would have had the same effect as a pleading that it now has. If, wherever the word "church" appears, by its full name or otherwise, a mere abstraction had been used, as, for the sake of illustration, the letter "x," the complaint would then allege that by virtue of the rules and regulations of "x," the defendant assumed certain obligations and the plaintiff became entitled to certain rights, yet no one would seriously contend that such allegations constituted a cause of action. The defendant can not be held liable on the contracts of his predecessor, unless he has expressly agreed in proper form and for a sufficient consideration to become liable thereupon. An agreement by one person to become liable for the debts of another must be an express promise in writing, and can not arise by implication from the fact of membership in an organization having rules to that effect. The personal contracts of a bishop are the same as those of a layman, so far as their form, force, and effect are concerned. This is true of his engagements as trustee. The same evidence is required to constitute a "church trust" and to bind a bishop as trustee thereof, as would be required in the case of a layman alleged to be a trustee, under like circumstances. The mere receipt of property by one person, alleged to be the trustee of such a trust, under the will of another person, alleged to have been the preceding trustee thereof, forms no consideration for a promise subsequently made by the former, as an individual, to or for the benefit of third persons. No promise in any form is alleged to have been made by the defendant to the plaintiff, but simply a general promise, made to the church, as we read the complaint, by virtue of its rules and regulations. The promise could not have been made to Bishop Loughlin, for he was not alive when it is said to have been made. A promise made to pay the

personal debts of the deceased bishop out of trust funds could not be enforced, as it would be a misappropriation. If, as alleged, Bishop Loughlin was individually liable to the plaintiff for his salary, that individual liability could be enforced against his individual estate by the usual procedure against his personal representatives. We find no trust set forth that is capable of enforcement, but simply a moral obligation, dependent entirely upon the integrity of the bishop. For aught that appears, the church at large depends wholly upon moral power to carry on its functions without appealing to the civil authorities for aid, either through the Legislature or the courts. The complaint alleges no common-law, equitable, or statutory cause of action. If all averments relating to the rules and regulations of the church were stricken out, nothing of substance would remain upon which the defendant could be held liable. No force can be given to the rules and regulations as alleged, because there is no allegation as to the civil standing, position, or rights of the body that is supposed to have made them. Even if an express promise had been made by the deceased bishop, as an individual, to the plaintiff, instead of a promise implied from the usages of the church, there would have been no consideration to support an agreement by the defendant, as an individual, to carry out the promise made by his predecessor. The receipt of trust property, by him, as trustee, constitutes no consideration for an individual promise. In other words, the defendant can not be held liable as trustee of the church to use trust funds to pay the individual debts of Bishop Loughlin, for that would be an unlawful use of trust funds, and he can not be held liable, as an individual, to pay those debts for the want of sufficient consideration and an express promise in proper form.

The claim of the respondent, that the bishop, individually, is the employer of the plaintiff and liable as such for his compensation, is not sustained by the complaint. The legal relation of master and servant is not alleged,

either expressly or impliedly, for, according to the complaint, the bishop, as such, holds the property of the church in trust, and has the power to assign priests to duty, but is liable as an individual and not as trustee, for the services of the priests upon such assignments, by virtue of the laws of the church and not through his personal promise. Obviously, this relation is in no sense that of master and servant, but that of an ecclesiastical superior and inferior, with an alleged obligation arising from the laws of the church on the part of the former to become personally liable for the services rendered by the latter to the church. The relation of priest and congregation is not involved, but that of priest and bishop.

This subject was considered in *Tuigg vs. Sheehan (101 Pa. St., 363)*, where a priest sued his bishop for salary, and the canon law bearing on the organization of the church and the relation of the priesthood and the bishops was before the court. The trial court found that the plaintiff was entitled to a salary of $800 per year under the common law of the church, which guaranteed him a support when he was ordained as priest. The Supreme Court, however, held that while the organic law of the Roman Catholic Church was to the effect that the church was bound to provide a decent support for its priests, this did not constitute an implied contract on the part of the bishop of the diocese to support the priests therein; that no priest, in the absence of an express contract, could bring assumpsit against his bishop for an amount sufficient to decently support him, and that the relation between a Roman Catholic bishop and priest is not that of hirer and hired, or principal and agent. In deciding the case the court said: "The plaintiff alleges that the law of his church creates a duty from which springs an implied contract on the part of the bishop to support him so long as he remained a priest of the diocese, and was not convicted of any offense or suspended from his priestly functions. Is this position sound? The obvious test is to reverse the position and treat this as a suit by the

bishop to recover damages from the plaintiff for a failure to perform his priestly functions, or any duty prescribed by his ordination vows. No one will contend that such a suit could be maintained. The plaintiff can lay down his office and its duties at pleasure. For doing so he could only be visited with ecclesiastical censure, and such punishment, if any, as the canons of the church prescribe. The bishop would have no remedy in the courts of law. It will thus be seen that there is no mutuality. . . . It would be doing a wrong to the Catholic Church and degrade its priesthood from their high position were we to hold that the relation between the bishop and his priest was that of hirer and hired, of employer and employee. The moving consideration in such contracts is the pecuniary advantages flowing from the relation. When a priest dedicates his life to the church and takes upon himself the vows of obedience to its laws, he is presumed to be actuated by a higher principle than the hope of gain. Where he has an actual contract with his congregation or his bishop for a salary, it may be enforced as any other contract; but where he relies upon the duty of his church to support him, he must invoke the aid of the church if he seeks redress."

In *Rose vs. Vertin (46 Mich., 457)* it was held that a bishop is not liable for the salary of a priest whom he has engaged, and that they are fellow-servants of the church, for which the bishop acts merely as a superior agent and not as a principal. The learned justices united in saying that " the bishop was the priest's superior, and, according to the established order of things in the economy of the church government regulating the degree of subordination and the methods of administration, it was the province of the bishop to designate the place for the priest to exercise his functions, and prescribe under certain limitations the rules and precepts for his guidance and control. But both were common servants of the church, and the service of the priest was not a service for the bishop, nor was the bishop, in respect to the employment, a principal. . . .

Men are constantly going into positions under appointment by superior agents, and where no liability for compensation rests on the employing agent, and the means of payment, if they come at all, are to come from another source. Cases of illustration are infinite. They abound in business operations, and marked instances may be seen in the great missionary enterprises which are carried on. No one supposes the existence of a legal liability on the part of the appointing agency."

In *Methodist Church of Newark vs. Clark (41 Mich., 730, 737)* it was declared that "where there is no incorporation, those who deal with the church must trust for the performance of civil obligations to the honor and good faith of the members."—(See, also, Hoffman's "Ecclesiastical Law," 141, 145; Andrews's "Church Law," 4, 57; Humphrey's "Law of the Church," 2, 62.)

Without prolonging the discussion, we announce as our conclusion that the complaint does not set forth a cause of action, and that for this reason the third defense pleaded in the answer is sufficient, for when the complaint is defective the answer is not demurrable. *Baxter vs. McDonnell, 154 N. Y., 432, 436.* It is, therefore, our duty to reverse the judgments of the courts below, and to overrule the demurrer to the third defense set up in the answer, with costs, and, under the circumstances, to answer the questions certified, as to the insufficiency of said defense in the negative.

Haight, J. . . . The plaintiff does not count upon any express agreement or contract, but upon a claim founded wholly upon church laws or customs. The defense is that the plaintiff himself, prior to the commencement of this action, brought suit against the defendant for the same cause in the Metropolitan Court of the diocese, that being an ecclesiastical court possessing jurisdiction as such over the parties and the subject-matter of the controversy, that the cause was duly heard in that court and decided. The precise question is, whether such a defense to such a cause of action or claim is good in law. Judge Bradley, in

the court below, conceded that the plaintiff was bound by the determination of that tribunal so far as related to the matter of discipline and ecclesiastical rules, laws, and customs of church government; and when rights of property are dependent upon the questions of doctrine, discipline, or church government, the civil court will treat the determination made in the highest tribunal within the church as controlling.—*Watson vs. Jones, 13 Wall., 679; Connitt vs. R. P. D. Church of New Prospect, 54 N. Y., 551.*

But he was of the opinion that that tribunal did not have jurisdiction to determine other civil and temporal rights. We need not question this rule. As we have seen, the plaintiff has alleged no express contract. He claims under some custom or law of the church that he should be paid a salary, as a priest, of a thousand dollars per year, by the bishop. Here the plaintiff asks the civil courts to examine and pass upon questions growing out of his relations to the church and the bishop, as one of the priests of the diocese.

In such a case, when it appears that the whole controversy had once been submitted by the parties to the ecclesiastical tribunal which the church itself has organized for that purpose, the civil courts are justified in refusing to proceed any further. The decision of the church judicatory may and should then be treated as a bar to the action and a good defense in law.

When an individual joins an incorporated club or legally organized body with power to make laws and rules for its own government, and for the regulation of the conduct of its members, the member becomes bound by those laws and rules, and a decision by the body or a duly constituted committee proceeding according to judicial forms touching his rights or relations as a member, is binding upon the courts.

A priest or minister of any church, by assuming that relation necessarily subjects his conduct in that capacity to the laws and customs of the ecclesiastical body from which he derives his office and in whose name he exercises

his functions, and when he submits questions concerning his rights, duties, and obligations as such priest or minister to the proper church judicatory, and they have been heard and decided according to the prescribed forms, such decision is binding upon him and will be respected by the civil courts. The decisions of the courts in this country are substantially in accordance with this view.—*In re Haebler vs. N. Y. Produce Exchange (149 N. Y., 414); People ex rel. Johnson vs. N. Y. Produce Exchange (149 N. Y., 401); O'Hara vs. Stack (90 Penn. St., 477); Stack vs. O'Hara (98 Penn. St., 213); Tuigg vs. Sheehan (101 Penn. St., 363); Kerr's Appeal (89 Penn. St., 97); Rose vs. Vertin (46 Mich., 457); Chase vs. Cheney (58 Ill., 509); People ex. rel. Meads vs. McDonough (8 App. Div., 591).*

He can always insist, of course, that his civil or property rights as an individual or citizen shall be determined according to the law of the land, but his relations, rights, and obligations arising from his position as a member of some religious body may be determined according to the laws and procedure enacted by that body for such purpose.

The question should be answered in the negative, and the judgment reversed, and demurrer overruled, with costs.

Vann and Haight, J.J., read for reversal of judgment and overruling of demurrer to the third defense, with costs, and for answering in the negative the question certified; Parker, Ch. J., O'Brien and Bartlett, J.J., concur with both opinions; Martin, J., concurs with Vann, J.; Gray, J., absent.

Judgment reversed, etc.

The Late Corporation of the Church of Jesus Christ of Latter-Day Saints vs. United States.
The Supreme Court of the United States,
October, 1889.
Reported in 136 U. S. Reports, 1.

Mr. Justice Bradley, after stating the case, delivered the opinion of the court:

The principal questions raised are, first, as to the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints; and, secondly, as to the power of Congress and the courts to seize the property of said corporation and to hold the same for the purposes mentioned in the decree.

The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the Territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the Territory, or other property belonging to the United States.

. . . . . .

This brings us directly to the question of the power of Congress to revoke the charter of the Church of Jesus Christ of Latter-Day Saints. That corporation, when the Territory of Utah was organized, was a corporation *de facto*, existing under an ordinance of the so-called State of Deseret, approved February 8, 1851. This ordinance had no validity except in the voluntary acquiescence of the people of Utah then residing there. Deseret, or Utah, had ceased to belong to the Mexican government by the treaty of Guadalupe Hidalgo, and in 1851 it belonged to the United States, and no government, without authority from the United States, express or implied, had any legal right to exist there. The Assembly of Deseret had no power to make any valid law. Congress had already passed the law for organizing the Territory of Utah into a government, and no other government was lawful within the bounds of that Territory. But after the organization of the territorial government of Utah under the Act of

Congress, the Legislative Assembly of the Territory passed the following resolution: "*Resolved, by the Legislative Assembly of the Territory of Utah*, That the laws heretofore passed by the provincial government of the State of Deseret, and which do not conflict with the organic act of said Territory, be and the same are hereby declared to be legal and in full force and virtue, and shall so remain until superseded by the action of the Legislative Assembly of the Territory of Utah." This resolution was approved October 4, 1851. The confirmation was repeated on the 19th of January, 1855, by the act of the Legislative Assembly, entitled, "An Act in relation to the compilation and revision of the laws and resolutions in force in Utah Territory, their publication and distribution." From the time of these confirmatory acts, therefore, the said corporation had a legal existence under its charter. But it is too plain for argument that this charter or enactment was subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose. Like any other act of the Territorial Legislature, it was subject to this condition. Not only so, but the power of Congress could be exercised in modifying or limiting the powers and privileges granted by such charter; for if it could repeal it could modify; the greater includes the less. Hence there can be no question that the Act of July 1, 1862, already recited, was a valid exercise of Congressional power. Whatever may be the effect or true construction of this Act, we have no doubt of its validity. As far as it went it was effective. If it did not absolutely repeal the charter of the corporation, it certainly took away all right or power which may have been claimed under it to establish, protect, or foster the practice of polygamy, under whatever disguise it might be carried on; and it also limited the amount of property which might be acquired by the Church of Jesus Christ of Latter-Day Saints; not interfering, however, with vested rights in real estate existing at that time. If the Act of July 1, 1862, had but a partial effect, Congress still had

the power to make the abrogation of its charter absolute and complete. This was done by the Act of 1887. By the 17th section of that act it is expressly declared that "the acts of the Legislative Assembly of the Territory of Utah, incorporating, continuing, and providing for the corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called General Assembly of the State of Deseret, incorporating the said church, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said corporation, so far as it may now have or pretend to have any legal existence, is hereby dissolved." This absolute annulment of the laws which gave the said corporation a legal existence has dissipated all doubt on the subject, and the said corporation has ceased to have any existence as a civil body, whether for the purpose of holding property or of doing any other corporate act. It was not necessary to resort to the condition imposed by the Act of 1862, limiting the amount of real estate which any corporation or association, for religious or charitable purposes, was authorized to acquire or hold; although it is apparent from the findings of the court that this condition was violated by the corporation before the passage of the Act of 1887. Congress, for good and sufficient reasons of its own, independent of that limitation, and of any violation of it, had a full and perfect right to repeal its charter and abrogate its corporate existence, which of course depended upon its charter. . . .

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